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E L E M E N T S

2. OF THE *Hargrave*

C I V I L L A W.

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L O N D O N.

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T O T H E R E A D E R.

THE following Papers, as their Title sets forth, are meant to serve for an Introduction to the Study of the Civil Law; or rather, to contain the Principles of Law in general. And though no Pains have been wanting on my part to render them in some measure fit for a Public View, yet am I sensible, that their principal Recommendation must depend upon the Merit of the Private Service, for which they were originally intended, and of that Occasion that first produced them.

When the Right Hon. the Earl GRANVILLE intrusted me with the Care of his Grand-Sons, the Right Hon. the Lord Viscount WEYMOUTH, and the Hon. Mr. HEN. FRED. THYNNE, He was pleased at the same time to lay the Plan, and suggest the Methods, of their Education. During his Instructions upon that Article, which I number among my many and great Obligations, it was impossible for Him to forget the Saying of a very distinguished Ancient, who being asked what He had directed his Children to be taught, Ταῦτ', εἶπεν, οἷς καὶ ἄνδρες γενόμενοι χρήσονται. *

It was recommended to me therefore, above all Things, to lay out the Rudiments of Civil Life, and of Social Duties; to enquire into the Foundations of Justice and of Equity; and to examine the principal Obligations, which arise from those several Connections, into which Providence has thought proper to distribute the Human Species. In which Contemplation I was not only to consider, how Nature herself struck off the Dimen-

* Plutarch. Apophthegm. Lacon.

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sions, and sketched the Out-lines of Duty, but also to view the Shadings and the Colourings of Civil Establishments, and of that School in particular, that had the happiest Manner of Finishing.

In Consequence of these Commands, I drew together, with all the Accuracy that the Circumstance of Time would admit, what Observations I could form, or had already gathered, upon this Subject; and out of the great Compass of Law selected such Truths, as I apprehended would be of the most general Use and Satisfaction. And having first laid the Foundation in the original Conclusions of Natural Law, The Consent of Ages and of Nations, and the experienced Method of Education, directed me to the System of that People, who, without any invidious Comparison (for I intend none) are allowed to have written the best Comment upon the great Volume of Nature.

The Roman Law is very advantageously circumstanced (at least for such Purposes as These) above many other Dispensations of Justice. It was originally a System —— and a good One; the Result of long Attention and sober Deliberation; conducted by Lawgivers of great Temper and Philosophy; plan'd upon the fairest and most rational Principles of Humanity; shaped and moulded by comparative Schemes of Polity; matured by long Experience; and lastly (by a Revolution full of Equity) as it was formed upon the best Models of Antiquity, so has it been honoured, illustrated, and copied by many States and People that followed after.

The Noble Lord therefore, upon a Sight of those Notes, which I had drawn out for the Purposes above-mentioned, was pleased to think, that if the Foundations were somewhat extended,

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tended, and the Lineaments a little enlarged, They might form no contemptible System for the Public. The World, sufficiently acquainted with many instances of his Judgment, will forgive this single one of his Partiality. In the same manner as he has been always considered the great Friend of Letters in general: though many of his Favours have been extended to me.

His Commands were obeyed, whatever I was to sacrifice: I could not dispute so little, where I owed so much. And thus is the Publick possessed of a Treatise, which indeed I intended not for them. They have it, with all its Imperfections, which I fear are Many, and with all its Uses, for it may have Some. It may have this at least: Those who come after me, both better prepared, and better qualified for a Work of this Nature, may be inclined by what they see here, to enrich their Systems of Roman Law, more than has hitherto been done, with the Manners, Rites and Customs of the Roman People: and consequently may find some Merit in the Plan of these Papers, whatever be that of their Execution.

I cannot let them go out of my Hands, without doing Justice to those two Noble Personages, for whose Use they were first intended, and who are now about entering, with them, upon the publick Stage. Let me express my private Acknowledgments for that Sweetness of Disposition, which made my Administration so easy. Let me add, for which I have sufficient Warrant, the Sense of a whole University, who hold the Remembrance of them dear: the Remembrance, of being honoured with their Education, and benefited by their Example. And let me avail myself of this last Act of the Tutor's Authority, by laying before them, how much the Public has

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has a right to expect from them hereafter, by the Assurances They have given already. The Promises, which attend the Spring of Life, are the Pledges of a future Conduct: and I write, not with Distrust, but with a great Degree of Satisfaction, when I remind them of the Harvest.

God bless them! May their Country be long happy in their Character, and longer in the Influence of it! May the honoured Lord, who shewed them the Way to Greatness, live to see the Image of his public and his private Virtues reflected strongly in the Honours and Perfections of these his illustrious Descendants! And, if I may be allowed to interpose my little Interests, may it be the Reward of a Life spent in Letters, to have it remember'd, that those Letters contributed in any degree towards forming the Character of Lord WEYMOUTH!

What my Reader is to expect in general from the following Treatise, has in some measure been open'd above. I am now to observe, as to the manner of the Execution, that in a Work of this Nature He is to look for neither Elegance nor Amusement. The Graces of Composition were neither attempted by the Writer, nor did they perhaps fall within his Powers, but certainly not within his Subject. It is still but a Lecture——contenta docere. And though I have not been wanting in relieving my Reader with some Digressions of Curiosity (many of which, I am satisfied, are new, and some possibly may not be unacceptable) yet will He be considerably disappointed, if He looks for Entertainment without the Expence of Attention. Such Readers have that abundantly made up to them in many a Volume, which the Liberality of this Age has kindly provided: in a large Profusion of Novels, Lives and Adventures: a Profusion,

fusion, that all Antiquity taken together was possibly unacquainted with the like; and such a one, as Posterity will neither easily apprehend, or readily believe. And harmless as such Treatises may be in the Hands of the 'Prentice behind the Counter, yet I cannot but express my Fears and my Apprehensions for the Cause of Learning, when I see them attend the Scholar into his Closet.

As the Design of this Work was not only to strike out a competent System of Roman Law; but by the help of that also, to explain some particular Passages of the Roman Writers, indeed to illustrate throughout the One by the Other: my Reader will find himself frequently interrupted, with many and very large Quotations from the Greek and Latin Authors. For these seemed, upon the Scheme I set off with, to claim a Right of being heard, and to be treated as Principals: not to take the second place, or lie neglected in the Margin. He will frequently meet with what I here acquaint him with before-hand: And He will perhaps, under these Instructions, see some reason, why it could not well be otherwise. I should be sorry to find an Objection lie against what I apprehend to be the principal, perhaps I should rather say, the only, Value of the Performance.

The mutual Dependance of these two Kinds of Learning is so very obvious, that it wants not to be mentioned. Multis auctor fui, says the incomparable GRAEVIVS, ut antequam Elementa hujus scientiae delibent ex Justiniani Imp. Institutionibus, SIGONII libros de antiquo Jure Civium Romanorum pervolvant. Nulli non, qui meae paruerant auctoritati, operae precium se tulisse sunt testati, mihiue gratias egerunt.

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egerunt. Which Passage I produce, not to borrow the Authority of the Writer, but to revive, if possible, the Instruction. Every one is sensible, how much the Study of the Civil Law has been advanced by the Aid of Classical Learning, since the Time of Alciat, when he fled from before the Face of his Brother-Lawyers, who were of Opinion that they could do very well without it, and made his Life uneasy for the Share He had in introducing it.

Alciat was of the first Flight of Scholars that poured in this Light upon the Study of the Law. And though his Abilities were great, and his Services considerable, yet, as Learning is generally circumstanced, our Obligations rose higher of course to the Civilians of the next Age, viz. to Hoto-mannus, Brissonius, etc. and above all, to Cujacius; None of whom perhaps had less Abilities than Alciat, and All of them many happier Opportunities of Improvement. I am not going to flatter the present Set of Writers, when I suggest to them, that they are happily circumstanced to make the Third Period. The many great Discoveries in Antiquity, the Use of several curious Monuments, which were denied to former Ages, have given them, in that respect, an Advantage of Situation, above the great Race of Men, that went before them.

Not but some very excellent Civilians among the moderns, such as Noodt, Bynkershoek, D'Arnaud, Heineccius, Idsinga, Wieling, etc. have great personal Merit of their own. I take this Occasion moreover to mention these Writers, that I might at the same time express my Obligations to them, for the Service which They in particular have afforded me, in the Prosecution of this Work.

And

And upon the Score of Obligation, I must not be unmindful of that most admirable and useful Writer, Joach. Hoppius, who has deserved so well of the Civil Law, in his Succincta Commentatio ad Institutiones Justinianeas. If I was qualified to recommend, the Turn and Manner of his Comments is such, that I think they might very successfully serve for an Introduction to the more diffusive and comprehensive Work of Vinnius, where We commonly set out. Above all, the Lemmata or Axioms, which He is constantly gathering up, in the Course of his Notes, are the happiest, the clearest, and the most faithful Compendium of Law, that I ever met with; and with the help of a small Comment, would make a valuable System by themselves.

To these, and many other valuable Writers, I profess my Acknowledgments for the Light they have sometimes afforded me: and hope to be excused the Liberty I have sometimes also taken of differing from them in Judgment. Of my Reader I must ask pardon for some Errors of the Press, which yet I believe are neither capital, nor numerous: And lastly, let me acquaint the Subscribers to my Edition of Demosthenes, that after this long Trespass upon their Patience, (for which however the Occasion of the following Work will plead something in Abatement) I engage faithfully for the Publication of the Second Volume very early in the Winter; and in the mean time suggest to them that they will see many Tokens of its Forwardness, in several Quotations from it, if any thing shall encourage them to read over the following Treatise.

CAMBRIDGE,
May 24, 1755.

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INTRODUCTION:

CONTAINING

A succinct History of the ROMAN LAW.

THE History of the Roman or Civil Law has been attempted by several, and by some well executed.

Of these Writers I can imagine several distinct Classes or Species: Namely, *First*, such as write professedly upon this Subject, as *Val. Forsterus*, who was one of the first, *P. Taisand*, and *Claude-Joseph de Ferriere*, two French Authors, *S. van Leeuwen*, *Strykius* in his *Praecognita Juris*, and many others; but more particularly, because more successfully, *Janus Vincent Gravina*, in his *Origines Juris Civilis*, and *J. Gottl. Heineccius*, in his *Historia Juris Civilis Romani*.

Secondly, this History may be found in many Prefaces to the *Institutes*, the *Pandect*, and the *Corpus Juris Civilis*.

And *lastly*, in several Comments upon that famous Fragment, the *Enchiridion* of *Pomponius*, a Roman Lawyer, which is preserved in the first book of the *Pandect*, second title, viz. *De Origine Juris*. The Writers upon this have been many. The most exact and critical is *Corn. van Bynkershoek*, the most historical and diffusive, *Wil. vander Muelen*.

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HISTORY OF

The Laws by which Rome was governed in its infancy, were of three sorts :

I.

The Manners and Customs of the first Inhabitants, or of those states, which they left, when They were first incorporated into this new settlement.

² Antiq. Rom.
I. 30.
³ lib. 5. p. m.
231.

⁴ Dionys.
Halic. l. 32.

⁵ P. Manut.
de LL.

⁶ XVI. Noct.
Attic. 10.

⁷ XXX. 4.

⁸ Virg. VIII.
Aen. 321.

⁹ Aristot. VII.
Polit. 10.

¹ Dion. Halic.
lib. 1. passim.
Vid. § 60.

Item lib. 1. fin.
lib. 2. init.

Pausan. Ar-
cad. c. 3.

Jostinian. No-
vell. 25. pr.

For it is natural to suppose, that the Colonys of old retained the Manners and Customs of their mother city : These are by *Dionys. Halic.* ² said to be *μητροπόλεως μνημόνα*, *Indications of their Original*, *Strabo* ³ expressly says, that Rome and Alba had in common *τὰ ἴσα, ἢ ἀλλὰ δίκαια πολιτεία*. And when the colony of Arcadians arrived in Italy under the conduct of Evander, they are said to have brought their own country discipline along with them : *τοῖς οἰκοθεν νομίμοις χρῶμεναι* ⁴.

Romulus, Numa, and Tarquin the Elder, being of three distinct races or people, introduced so many distinct modes of Religion and Politics.

Horum unusquisque ad suam patriam respexerit, et ea quae in iis populis probabiliora videbantur instituta delegerit, Romaeque legibus sanxerit ⁵.

ROMVLVS was originally of Alba, and by that means was possessed of the *Jus Faunorum atque Aboriginum*, mentioned by *A. Gellius* ⁶, if he be in earnest. For I take him in the same light, as I do *Ammianus Marcellinus* ⁷.

Trebatium loquuntur, et Cascellium, et Alfenum, et Auruncorum Sicanorumque jam diu leges ignotas, cum Evandri matre, abhinc seculis obrutas multis.

However it is not to be supposed, that the *Aborigines* lived without some discipline ; since it is expressly said of Saturn, who had some concern with them,

*Is genus indocile, ac dispersum montibus altis
Composuit, legesque dedit* ⁸.

Italus, who was very early, and gave his name to this country, did the same :

Τῆτον δὲ λέγουσι τὸν Ἰταλὸν, νομάδας τὰς Οἰνωτρὲς ὄντας, ποιῆσαι γεωργίας, ἔ νόμους ἄλλους τε αὐτοῖς θέσθαι, ἔ τὰ συσσιτία καλεῖσθαι πρῶτον· διὸ καὶ νῦν ἐστὶ τῶν ἀπ' ἐκείνων τινες χρῶνται τοῖς συσσιτίοις, ἔ τῶν νόμων ἐνίοις ⁹. †

Moreover, as Evander had settled in that part of Italy from Arcadia, and before him the Pelasgi, and higher still the Oenotri, both possibly from

* *Sacra et alia jura civilia.*

† *Hunc autem Italum tradunt, cum pastores forent, Oenotros reddidisse agricolas, et leges alias ipsis tulisse, et Syssitia [concoenationes] primum instituisse. Quapropter et nunc etiam nonnulli, qui ab eo ortum ducunt, utuntur Syssitiis, et legibus nonnullis.*

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the same part of Greece also, Rome (as we have in some measure seen above) availed itself of the manners and customs of the Arcadians. And that the *Lupercalia*, among other Antiquities, shew².

I cannot but add the distinguishing mark of the Senators, (or, according to others, the Patricians) the *Calcei Lunati*, the ἀγερρόεντα πέδιλα, as they are called in the Inscription upon Regilla, the wife of Herodes. This mark is still extant in some of their monuments, and is thus expressed by their Poets:

*Felix et Sapiens, et Nobilis et Generosus
Adpositam nigrae Lunam subtexit Alutae¹.
Sic te, clare Puer, genitum sibi Curia sensit,
Primaque Patricia clausit vestigia Luna².
Lunata nusquam pellis, et nusquam toga,
Olidaeve vestes murice³.
Non extrema sedet Lunata lingua planta,
Coccina non laesum cingit aluta pedem⁴.*

And We are assured that it is copied from the manners of the Arcadians⁷.

NVMA was a Sabine, and the Sabines were the Scholars of the Lacedaemonians⁸.

*Sabini a Lacedaemoniis originem ducunt, ut Hyginus ait de Origine
Vrbium Italicarum—Cato et Gellius a Sabo Lacedaemonio trahere
eos originem referunt.—Sabinorum mores P. R. secutum idem
Cato dicit⁹.*

*Majores nostri sedentes epulabantur, quem morem habuerunt a Laco-
nibus et Cretensibus, ut Varro docet in libris de gente P. R. in
quibus dicit quid a quaque traxerint gente per imitationem¹⁰.*

Μιμησάμενοι κατὰ πάντα τὴν Λακεδαιμονίων πολιτείαν διετήρησαν αὐτοὶ
μᾶλλον ἢ ἐκεῖνοι¹¹. *

And yet it is said of the Lacedaemonians:

Λακεδαιμόνιοι μάλιστα τῶν ἄλλων Δωριέων τὰ πατρία διαφυλάττουσι¹². †

It was the opinion of some, according to *Plutarch* in the place lately cited, that *Numa* was taught his laws and his Politics by one *Pythagoras* a Spartan.

Πυθαγόραν δὲ τὸν Σπαρτιάτην, Ολύμπια νενικηκότα γάδιον ἐπὶ τῆς ἐνκαί-
δεκάτης Ολυμπιάδος, ἧς ἔτι πρὶν Νεμῆος εἰς τὴν βασιλείαν κατέστη,

* *Idem* [Romani] cum Lacedaemoniorum disciplinam sibi tenendam esse decrevissent, constantius in ea vel ipsis [Lacedaemoniis] permansere.

† Lacedaemonii prae ceteris Dorensibus patrias consuetudines rigide tuentur.

² Dion. Halic. I. 80.
³ Xenophon. Anab. lib. i. p. 13. Edit. Hutchinson. compared with Plutarch. Vit. Anton. Tom. V. Edit. Bryan. p. 77.
⁴ Rofin. III. Antiq. Rom. 2.
⁵ Juvenal. VII. Sat. 191.
⁶ Stat. 5. Sylv. II. 27.
⁷ Martial. I. 50. 31.
⁸ Id. II. 29. 7.

⁹ Plutarch. Quaest. Rom. 76.
¹⁰ Landi Numism. p. 54. Ed. Lugd. 1695. 4.
¹¹ Nic. Loenf. Epiphyl. IV. 25.
¹² Plutarch. in Numa. init.
¹³ Serv. ad Virg. VIII. Aen. 638.
¹⁴ Id. ad VII. 176.
¹⁵ Athen. lib. 6. juxta fin.

¹⁶ Id. Athen. XIV. 5.

πλανηθέντα περὶ τῇ Ἰταλίᾳ, συγγενέας τῷ Νυμᾷ, ἔ συνδιακοσμήσαι
τῇ βασιλείᾳ· ὅθεν ἐκ ὀλίγα τοῖς Ῥωμαῖκοῖς Ἰππηδεύμασι τῶν Λακίωνων
ἀναμεμίχθαι, Πυθαγόρου διδάξαντος.*

* II. 59.

⁴ Dion. Halic.
II. 59. Liv. 1.
18. et not. ad
loc.
Bentley's Dis-
sertat. upon
Phalaris.
⁶ Chronol.
p. 128.

And this Tradition perhaps might give occasion to the prevailing notion of an intercourse subsisting between *Numa*, and the more celebrated *Pythagoras* the Samian. A suspicion which is in some measure given into by *Dionys. Halic.* * who says, it is possible, another of the name of *Pythagoras*, who preceeded the Philosopher, might occasion the mistake; though he never met with the account of any such person. This Notion was still supported by the turn which we see in what is left us of *Numa's* Laws, agreeable to the symbolic or allegorical colouring of that Master: which was taught by many schools of Philosophy, and is still discernible in several Laws of Solon. But notwithstanding some flattering similitude between what the One taught, and the Other instituted, nothing can bring these two acquainted, as the present system of Roman History stands. Indeed according to Sir *Isaac Newton* ⁶, who brings down the Aera of the City to the 38th Olympiad, there is nothing inconsistent in the tradition. But all the early (or fabulous) part of the Roman History is but little to be trusted to: Something has been said upon that question by *Christ. August. Heumannus* in his *Theses Scepticae ex Historia Romana*: more by *M. de Pouilly* and *M. l'Abbé Sallier* Tom. VI. de l'*Acad. Royale des Inscriptions*, and last of all by *L. D. B.* a French Writer 1738. upon this very subject.

It was not peculiar to this People to have the dawn of their History wrapt up in Fable and Mythology, or set in with something that looked like Marvellous and Praeternatural. There is scarce a Nation, that we are acquainted with, but has this foible in a greater or lesser degree, and almost pleads a right to be indulged in it.

Datur haec venia Antiquitati, ut miscendo humana divinis primordia urbium augustiora faciat ⁷.

⁷ Liv. I. Praef.

⁸ Boxhorn.
Quaest. Rom.
18.
⁹ Plutarch.
Num. init.
Liv. VI. 1.
¹ Liv. VIII. 40.

Indeed the Romans themselves had some suspicion of their own History. They generally dated their Periods not *ab V. C.* but began their Aera from their Consuls, by whom they always reckoned ⁸. The Records of Rome were burnt at the irruption of the Gauls: they had nothing for it but Tradition before that Period ⁹. Nor was there an Author extant of that Age, or near it, at the time that *Livy* compiled his History ¹. *Diocles Peparethius* (the Father of Roman History, since *Fabius Pictor* the first Historian that Rome produced, and all his followers, copied him implicitly) was a Writer of no very great credit. The birth and education of Romulus is the exact counterpart of that of another Founder of a great Empire. And

* *Pythagoram Spartanum, qui Olympia stadio vicit Olympiade 16^a, cujus anno tertio Numa regnum adeptus est, errabundum per Italiam, Numae in consortium venisse, et imperii formam una adornasse. Unde non pauca Lacedaemoniorum instituta Romanis admisceri.*

Romulus, I am satisfied, could not resemble more his brother *Remus*, than his brother *Cyrus*. The Expedient of *Tarquin's* conveying advice to his son by striking off the heads of flowers², is given, with the minutest difference, by *Aristotle*³, to Periander of Corinth, and, by *Herodotus*⁴, to Thra-sybulus. Which Similarity is very ill accounted for by *Camerarius*⁵. This was one of those *ambulatory* stories (*Plutarch* in his Greek and Roman Parallels will furnish us with many such) that seem confined to no one age, race, or country, but have been adopted in their turn, at several periods of time, and by several very different people, and are perhaps, at least some of them, true of none. And lastly, one would really imagine, that the History of the seven kings, which has such an air of Romance in it, was made on purpose for *Florus* to be ingenious upon in his Recapitulation of the Regal State of Rome⁶.

This is what may be suggested upon this subject; but we must make use of the lights that are left us, and under this sort of Protestation I return to my History.

TAROVIN the Elder came from Etruria, now Tuscany. And what a great share Etruria had in the religion and discipline of the Romans, in their manners and ceremonies, both as to name and thing, every one is very well satisfied.

*Tantum autem studium antiquis non solum observandae, sed etiam amplificandae, Religionis fuit, ut e florentissima tum et opulentissima civitate decem principum filii S Cto singulis Etruriae populis percipiendae sacrorum disciplinae gratia traderentur*⁷.

It is not to be doubted, but that they were very attentive moreover to the best disciplined Constitutions of which they could get any intelligence. The division into Patricians and Plebeians was evidently from the Athenians, according to *Dionys. Halic.*⁸ who also writes thus in another place⁹:

Οὐκ αὐτοὶ τῷ ζήλῳ τῷδε ἄρξαντες, ἀλλὰ δὲ τῆς Αθηναίων πόλεως τὸ πρῶτον λαβόντες, ἧς μέγιστον κλέος ἐν Ἑλλησίν ἐστιν.*

And let me add *Athenaeus*,

Λαμβάνοντες εἴ τι χρήσιμον ἢ καλὸν ὑπῆρχε παρ' ἐκείνοις εἰς μίμνησιν, ὅπερ ἐν τοῖς πάλαι χρόνοις ἐποίουν οἱ Ῥωμαῖοι.†

II.

Thus much for their Customs, or *Mores patrii*: Another source of their Laws was the arbitrary Edicts or Decrees of their Sovereign in such Emergencies where their Customs failed them.

* Nos tamen hujus praeclari facinoris non sumus auctores, sed imitati sumus exemplum Atheniensis Reip. cujus maxima est gloria inter Graecos.

† Et siquid apud illos honestum ac pulchrum fuit, imitatione dignum, ut priscis temporibus Romani facere consueverunt, ad suos detulere.

*Et quidem initio Civitatis nostrae, Populus sine Lege certa, sine Jure certo primum agere instituit, omniaque manu a Regibus gubernabantur*³.

³ Dig. Lib. 1.

Tit. II. Lex. 2.

§ 1.

⁴ Ibid. § 3.

Where *Lex certa* and *Jus certum* is to be understood of a regular system of positive laws, drawn up by a proper authority, upon stated rules and fundamental maxims. So, *incerto magis jure et consuetudine ali, quam per latam legem*.

It remains to enquire what is meant by *Manus*.

Manus is generally taken for power or authority, for an absolute, despotic and unlimited controul. Thus *Manu*, or, *e Manu mittere*, is to confer liberty. *Nam quamdiu quis in servitute est, manui et potestati suppo-*

⁵ D. 1. 1. 4.

J. 1. 5. Pr.

⁶ pro Quintio

§ 2.

⁷ III. Controv.

⁸ XXXIX. 18.

Add. XXII. 4.

et Sallust. Ju-

gurth. § 14.

Not.

*situs est*⁵. Where *et* is not accumulative, but declaratory or expositive. *Manui, id est, Potestati*. So Cicero⁶, *Omnes quorum in alterius manu vita posita est, saepius illud cogitant, quid possit is, cujus in ditione et potestate sunt, quam quid debeat, facere*. And Seneca⁷, *Nemo potest alium in sua manu habere, qui ipse in aliena est*. Thus Livy⁸, *Mulieres damnatas cognatis, aut in quorum manu essent, tradebant, ut ipsi in privato animadverterent in eos*.

To bring home the word therefore, and to our purpose, *Manus*, when applied to Government, is that arbitrary kind of Administration, which depends rather upon the will of One, than the consent of Many.

*Hinc est quod Legum reperta est sacra reverentia, ut nihil Manu, nihil proprio ageretur impulsu*⁹.

⁹ Cassiodor.

IV. Var. 10.

*Credunt plerique militaribus ingeniis subtilitatem deesse, quia castrensis jurisdictio secuta et obtusior, ac plura Manu agens calliditatem fori non exerceat*¹.

¹ Tacit. in

Agric. § 9.

Add. Bynker-

hook III. Ob-

serv. 14. et

Praeterniss. ad

l. 2. § 1. D. de

Orig. Juris.

Muelen. Exer-

cit. in Tit.

Dig. de Just.

et Jure, p. 122,

123. 217.

² in Vit. Ca-

milli. p. 304.

Edit. Bryan.

³ D. 1. 2. 2. 2.

⁴ Of which see

a Remain. D.

11. 8. 2. et

Gothofred.

ad loc.

So Plutarch concerning the Dictatorship²:

Ἀντιπρόβουλον ἀρχὴν, ἐν χερσὶ τῷ δήμῳ ἔχουσαν. *

III.

They were such Laws, as were enacted by general Consent, and the public Authority of the State or People collectively.

*Postea aucta ad aliquem modum civitate, ipsum Romulum traditur populum in xxx partes divisisse, quas partes Curias appellavit.— Et ita Leges quasdam et ipse Curiatas ad populum tulit. Tulerunt et sequentes Reges*³.

The *Leges Regiae*⁴ were enacted chiefly, as far as the primaeval History of Rome can be depended upon, under the Administration of

ROMVLVS,

NVMA, and

SERVIVS TVLLIVS.

ROMVLVS.

*Vocata ad concilium multitudo, quae coalescere in populi unius corpus, nulla re, praeterquam legibus, poterat jura dedit*⁵.

⁵ Liv. I. 8.

* Imperium sine provocatione, in Manu jus habens.

THE ROMAN LAW.

7

*Aspera cum positis mitescent saecula bellis :
Cana Fides et Vesta, Remo cum fratre Quirinus,
Jura dabunt* ⁵.

And *Dionysius Halic.* does not scruple to prefer him to the most celebrated Legislators ⁶.

N V M A.

*Consultissimus Vir, ut in illa quisquam aetate esse poterat, omnis divini
atque humani juris* ⁷.

S E R V I U S.

*Νόμους συνέγραψεν ἐκ τῶν ἀρχαίων καὶ παρημελημένων ἀνανεύμενος, ἕς Ρώμυ-
λός τε εἰσηγήσατο, καὶ Νόμους Πομπήλιος, ἕς δὲ αὐτὸς καθιστάμενος* ⁸. *
*Nobis Romulus, ut libitum, imperitaverit : dein Numa religionibus et
divino jure populum devinxit : repertaque quaedam a Tullo et Anco,
sed praecipuus Servius Tullius sanctor Legum fuit, quis etiam Reges
obtemperarent* ⁹.

There was a copy of some Laws (for so *Dionys. Halic.* calls them) of *Servius*, which survived the Republic: but they were rather the articles of Convention between the People of the Latin Name, which *Servius* drew up for their common observation, when He formed that great alliance. They were engraven in Greek Characters (possibly that being a Language common to all the Parties concerned) upon a Column of Brass, which was preserved in the Temple of Diana upon Mount Aventine, a Temple founded upon this occasion, and by this contribution, upon the Model of the Temple of the same Goddess at Ephesus upon a similar occasion ¹.

The Conceit, that *Romulus* in his Legislation particularly attended to the *Jus Naturae*, *Numa* to the *Jus Gentium*, and *Servius Tullius* to the *Jus Civile*, has been sufficiently exploded by some late Civilians.

Much may be gathered concerning these Laws from *Plutarch* and *Dionysius Halicarnassensis*. Collections of them have been made with good Success, by some Moderns, viz. *P. Manutius*, *A. Augustinus*, *Moldius*, *Vrsinus*, *Lipsius*, *Rosinus*, *Forsterus*, *And. Cirino*, and *P. Merula*.

The laws of *Romulus*, to the amount of Eighteen, were published with a Comment by *Franc. Balduin*, an eminent Lawyer of the 16th Century, from a Monument in the Capitol, the Authenticity of which was assured to him by *J. Barth. Marlian*. But either *Balduin* or *Marlian* was imposed upon ².

These *Leges Regiae* were antiently collected into a Body by *Papirius*, a Roman Lawyer, who lived in that Age, and called from him *Jus civile Papirianum*: non quia *Papirius* de suo quicquam ibi adjecit, sed quod leges sine ordine latas in unum composuit ³.

* *Leges, quarum Romulus et Numa Pompilius auctores fuerant, vetustate jam neglectas iterum conscripsit, et ad usum revocavit, aliasque novas ipse tulit.*

⁵ Virg. I. Aen. 295.

⁶ II. Antiqq. Rom. 7. 24. &c.

⁷ Liv. I. 18.

⁸ Dion. Halic. IV. 10. Add. Stryk. Praecogn. Juris C. 1. § 5. Heinecc. ad Pandect. p. 10. Gravin. O-

rigg. Jur. Civ. L. i. § 31. Not. Tacit. III. Annal. 26.

¹ Dion. Halic. IV. Antiqq. Rom. 26.

² Marlian. Topograph. V. R. II. 8. Eric. Mauriti Differtat. de lib Jur. p. 92. G. Schubart. de Fatis Jurisprud. Rom. I. p. 64.

Christian. Thomasius de nova Balduini Opp. Edit. Lips. 1689 8.

G D'Arnaudii I. Var. Conject. 3. D. I. 2. 2. 2.

The

The *Jus Papirianum* was extant some time. It was commented upon by *Granius Flaccus*, as you find it quoted by *Paulus*⁴. A large Fragment is preserved of it in *Macrobius*⁵. *Flaccus* lived about the age of *Julius Caesar*⁶.

After the Expulsion of their Kings A.V.C. 244. the City was governed for about the space of 60 Years, as formerly, *incerto magis jure quam per latam legem*⁷. The *Leges Regiae* lost their Authority, but the best and most rational of them were observed as *Mores Patrii*, φιλανθρώπως & δημοτικῶς εἶναι δοκούντας—ἀνεκνώσαντο * i. e. *Conf. les*⁸. And where they did not reach, the Consuls, who were Kings in all but name and duration⁹, supplied the Defect, like *Romulus*, with their own Edicts and Decisions.

This Period of the Roman History was a continual Struggle for Power between the Patricians and Plebeians: as indeed much of the early History of Rome is taken up with disputes of that nature. Though the Question here principally lay, *Whether the State was to be governed by a precise and determinate System of written Law, or by the Jus incertum*, in other words, *the arbitrary Decisions of the Patricians?*

Another great Source therefore of the *Jurisprudentia Romana*, or Roman Law, was the Law of the XII. Tables.

An Vetus Regia Lex, simul cum ipsa Vrbe nata? An, quod secundum est, ab X. viris ad condenda Jura creatis, in XII. Tabulis scripta?

¹ Liv. XXXIV. 6.

For to compose the differences, I mentioned, it was agreed about the Year CCC. to send a Deputation into Greece, to inspect the Laws and Discipline of those States, and to get the best Information they could, towards compiling a System for the use of Rome. This Search directed them particularly to Athens. I dare not say, that *Pericles* in his Funeral Oration, and *Isocrates* in his Panegyric, had this Event in their Eye, when they recommend their own Country, as a School and Model to other States.

I shall content myself with the Testimony of *Cicero*. *Adiungunt Athenienses, unde Humanitas, Doctrina, Religio, Fruges, Jura, Leges ortae, atque in omnes Terras distributae putantur*². And that of *Pliny*: *Terra, quae Leges non victa acceperit, sed petentibus dedit*³.

² pro Flacco.

³ 26.

⁴ VIII. Epist.

⁵ 24.

It was with good reason that the Embassy was directed hither. A Writer of this Country, though a Panegyric one, however a good Judge in the matter, has thus described the Laws of Athens, in a Passage which I am persuaded would serve for a good Model to any State, that was either concerned in drawing up a system of new Laws, or had occasion to correct their old ones.

Ολίγες μὲν, ἱκανὲς δὲ τοῖς χρῆσιν μέλλουσι, ἔραδις συνιδᾶν, ἐπεὶ αὖτε δίκαιες & συμφερούσας, & σφίσι αὐτοῖς ὁμολογούμενες, ἔμαλλον

* *Leges, quae humanae et populares videbantur, revocarunt.*

ἐσπεδασμένοις τὸς περὶ τῶν κοινῶν ἐπιτηδεύματων, ἢ τὸς περὶ τῶν ἰδίων
 συμβολαίων, οἷα περ εἶναι χρὴ παρὰ τοῖς καλῶς πολιτευμένοις.*

⁵ Isocras: Pannathen p. 185.
 Edit. Wolf.

And yet after these Authorities (and many more might be produced) this Deputation to the States of Greece has been treated as chimerical by a French Writer in three entire Dissertations⁶.

⁶ Tom. XII.
 Acad. des
 Inscriptions
 p. 27—99.

The Delegates returned at the expiration of three years, and after a good deal of Contention, it was determined to dissolve the present system of Government by Consuls, and to create an Office of Ten Men *Consulari potestate, sine provocatione*. These were to draw up a system of Laws from the report of the Commissioners; which body of Laws was therefore sometimes called *Leges Decemvirates*⁷.

⁷ Dion. Halic.
 lib x. Liv. III.
 1. seq.

It is not to be understood as if the whole system or complexion of these Laws was Greek Law. This new constitution was made up also of their old Laws, their *Leges Regiae*, &c. which now were incorporated here, under the notion of *Mores Patrii*, or approved Customs⁸.

Tacit. III.
 Annal. 27.
 Eutrop. I. 17.

These Laws were divided into ten Heads, Titles or Tables, and proposed to the People⁹ for their approbation, in these words recorded by *Livy*:

D. 1. 2. 2. 4.
 Muelen. ad
 loc.

Quod Bonum, Faustum Felixque Reip. ipsis, liberisque eorum esset, ire et legere Leges propositas jussere. Se, quantum X. Hominum ingenii provideri potuerit, omnibus summis infimisque jura aequasse.—Eas Leges habiturum P. R. quas Consensus omnium non jussisse latas magis, quam tulisse videri posset:

⁸ Dion. Halic.
 II. 27. X. 57.
 Cujac. III.
 Observ. 40.
 Gul. Maranus
 ad D. 1. 2. 2.
 p. 107. 120.

Which words must mean, that these Laws were so well adapted to the Wishes, and Constitution of the Roman People, that they might be said to come from them, as well and as properly, as to be offered to them. The People might seem both *ferre* and *jubere*.

Sigon. de antiquo Jure
 Civ. Rom. I. 5.

For *Legem ferre* is the act of Him who did *Populum rogare*, or lay before the People a scheme or question He thought most adviseable, and for their interest. And therefore We now with some Impropropriety call those *Legislators*, who are more truly *Legum Conditores*.

⁹ A. V. C. 303.
¹ III. 34.

Legem jubere, or *sciscere*, on the other hand, is the act of the People, who give their consent and authority to this Proposal.

There is a form of this Rogation preserved in *A. Gellius*², and it runs thus: ² V. 19.

VELITIS IVBEATIS QVIRITES VTI LVCIVS VALERIVS LVCIO
 TITIO TAM IVRE LEGEQ. FILIVS SIBI SIET QVAM SI EX
 EO PATRE MATREQVE FAM. EIVS NATVS ESSET VTIQUE
 VITAE NECISQVE IN EO POTESTAS SIET VTI PATRI ENDO
 FILIO EST?

HAEC ITA VTI DIXI ITA VOS QVIRITES ROGO.

* Primum paucas, sic tamen ut satisfacerent, et cognitu faciles essent iis qui usuri erant: deinde justas et utiles, et inter se consentientes, et inter illas, eas magis elaboratas et majori cum diligentia constitutas, quae publica negotia spectant, quam quae privata commercia; quales demum decet esse in Rep. bene ordinata.

So again, *Patres Rogationem ad Populum ferri jusserunt* :

VELLENT IVBERENTNE CVM ANTIOCHO REGE QVIQVE
SECTAM EIVS SECVTI ESSENT BELLVM INIRI.

Si *carogatio* perlata effet, tum, si ita videretur, Coss. Rem integram
ad Senatum referrent ³.

³ Liv.
XXXVI. 1.

To return to the Decemviral Laws, or, as they are more frequently called, the Laws of the XII. Tables, which name they got upon the following occasion ;

The Decemviri were continued the next year, partly by the intrigues of Appius Claudius, who was at the head of them, and partly by a suggestion, that Two Tables more were wanted, which accordingly were added the year following ; when the Decemviri now became tyrannical, and were reproached by their fellow Citizens with the name of the Ten Tarquins. This, together with a wicked attempt upon the Daughter of a Roman Citizen, occasioned their Dissolution in the third year of their Administration, when the Government returned to its former system, and the Consulate and other Offices were resumed.

The History of this great Revolution is preserved in *Dionysius Halic. Livy, Diodorus Siculus*, and other Historians of Antiquity : and is described also with great exactness by some of the Moderns ⁴.

⁴ Catrou and
Rouille.
Vertot's Re-
volutions of
Rome.
Muelen. ad
D. 1. 2. 2. 24.

The fragments of these Laws have been collected from the old Writers, *Cicero, A. Gellius*, &c. and reduced with great accuracy under their original and proper Division of Twelve Heads or Tables, and illustrated moreover by a good Comment of *Gothofred* in a work, intitled, *Quatuor Fontes Juris Civilis*.

His collection, distribution, and interpretation, have been universally followed by all who came after him. Of whom the most considerable are *Gravina* in his *Orig. Juris Civilis*, and the Jesuits *Catrou* and *Rouille* in their Roman History.

Marcilius also, and *Conr. Rittersbusius* in his *Dodeca-Deltos*, are good Commentators, and, considering his time, a Countryman of ours also, *Rich. White* of Basingstocke.

⁵ pag. 18.

⁶ See p. 4. of
the same
Commentary.

All the Moderns, who have wrote upon this Subject, are recited by me, as far as I was able to gather them, in my Appendix to the Commentary *de Debitore difficando* ⁵. There were several also of the Romans themselves, that were employed in the same work ⁶.

This Collection or Body of Laws has been honor'd with the highest testimonies by some of the best writers of Antiquity :

⁷ Liv. III. 34.

Fons omnis publici privatique Juris ⁷.

⁸ Tacit. III.
Annal. 27.

Finis aequi Juris ⁸.

THE ROMAN LAW.

II

Favorinus in A. Gellius ⁹ affirms, *Se non minus cupide legisse LL.* ⁹ XX. I. XII. *Tabb. quam Platonis decem libros de Legibus.*

But *Cicero* is very remarkable. His account of this System is concluded in these words,

Fremant omnes licet, dicam quod sentio. Bibliothecas mehercule omnium Philosophorum unus mihi videtur XII. Tabularum libellus, si quis Legum fontes et capita viderit, et auctoritatis pondere et utilitatis ubertate superare ¹.

¹ I. de Orat.
^{44.} Add. I. de Orat. 43.

Perhaps my Reader will find some entertainment in a little History of this Legislation, which I have extracted, for its singularity, out of a Writer, who does not fall within every Man's reading.

After some notable discoveries upon the Origin of the Civil Law, and acquainting us that *Mercurius Trismegistus* gave a Body of Laws to the Athenians, *Lycurgus* to the AEgyptians, and *Solon* to the Lacedaemonians, (which mistakes He might have avoided, had He but copied his author ² right) He represents the History, we are concerned about, in the following words, the legendary part of which he owes to *Accursius*.

² Gratian. c. Moyfes 7. dist.

Advertens Populus ipse Romanus, quod non esset expediens ulterius sine lege diutius vivere, quaesivit habere leges Graecorum, scilicet leges Atheniensium conditas a Solone Rege: et cum illis vivere decrevit. Vnde congregatus ipse Populus elegit X. viros idoneos et bene peritos, quos Athenas misit pro transcribendis legibus Graecorum ex libris Solonis, et ut dictas leges ex Graeca scriptura in Latinam traducerent. Qui X. viri Romani fuerunt isti, videlicet, Appius Claudius, Titus Genutius, Publius Festus, Lucius Veturius, Caius Julius, Aulus Manilius, Publius Sulpitius, Publius Curiatus, Titus Romulus, et Spurius Posthumus. Et cum isti X. viri accessissent Athenas pro habendis legibus, Athenienses noluerunt statim copiam suarum legum eis facere, sed voluerunt prius explorare utrum Romani essent capaces, et digni suis legibus. Ad quod explorandum miserunt quendam Sapientem Graecum Romam. Quod quidem praescientes Romani, cum adventasset dictus Sapiens Graecus, decreverunt irridere eum cum omnibus Atheniensibus, qui eum miserunt. Et sic objecerunt illi quendam Stultum Romanum, ad hoc, ut ille Sapiens Graecus disputaret cum illo Stulto, et derisus recederet. Qui sapiens Graecus credens illum sibi obiectum esse sapientem, coepit cum eo disputare nutu et signis: et elevavit unum digitum, significans in corde suo, quod unus esset Deus. At ille Stultus credebatur, quod volebat sibi erueri unum oculum cum illo digito, et ipse elevavit, duos digitos, et etiam pollicem, et sic tres dicens in corde suo, quod si Tu vis mihi erueri unum oculum, ego eruam tibi duos oculos. Sed ille Graecus credebatur, quod Stultus ille intelligebat de Trinitate. Deinde Sapiens Graecus ostendit illi stulto manum apertam, significans in corde suo quod omnia sunt manifesta Deo: Stultus autem credebatur, quod volebat dare alapam sibi, et incontinenti ostendit ei pugnum clausum, significans, quod si vis mihi dare alapam, ego reperiui te pugno clauso. At Graecus Sapiens intellexit, quod per pugnum voluit Stultus significare, quod Deus omnia manu clauderet. Et sic putavit Romanos esse valde sapientes et dignos legibus. Et reversus fuit Athenas, et retulit Romanos esse legibus dignos, et sic fuerunt concessae Leges illis decem viris. Qui decem viri transcripserunt dictas Leges in decem tabulis eburneis et attulerunt eas Romam. His etiam decem viris fuit data potestas per Pop. Rom. interpretandi dictas leges, addendi et minuen. li. Vigore cujus potestatis videntes, quod aliquid deficiebat in dictis legibus, adjunxerunt alias duas tabulas scriptas:

³ Rob. Marant. *et sic factae fuerunt XII. Tabulae ex quibus causaliter denominata fuit Lex XII. Tabularum. Et ista Lex XII. Tabularum fuit principium Juris Civilis scripti, quo hodie utimur, et cum ista Lege XII. Tabularum incepit vivere Populus Romanus*³.

⁴ See this more minutely considered, Comment. de Inope Debitore, &c. pag. 5. The authority of these Laws underwent some considerable Revolutions⁴.

The *Lex Aebutia*, not that mentioned by Cicero⁵, but another, which was made *de Judiciis Centumviralibus*, contributed to break in upon their Obligation: *Qua lata consopita fuit omnis Antiquitas XII. Tabularum*⁶.

⁵ II. Agrar. 8. ⁶ Gell. XVI. 10. The *Lex Cornelia*, ex qua Praetores ex Edictis perpetuis Jus dicere jubentur, diminished it greatly. For till that time the Roman Youth began the study of the Civil Law from acquainting themselves with the Laws of the XII. Tables⁷: but afterwards from these Edicts of the Praetors⁸.

⁷ Cic. de Legg. II. 4. et 23. ⁸ Id. de Legg. 1. 6. (What is meant by the Edicts of the Praetors, by their *Edicta Perpetua*, and how these stand distinguished from the *Perpetual Edict* of *Julianus*, will be shewn hereafter, when I come to consider the several species of the Roman Civil Law, or those Principles, of which it is compounded.)

However they were always considered as the Basis and Foundation of the Roman Law. Wherefore the terms *Lex*, *Legitimus*, *Antiquam Legem*, *Legitimae Hereditates*, *Tutela Legitima*, &c. are frequently to be understood of these Laws⁹; and indeed whatever, by the *Interpretation* of the Roman Lawyers, might fairly be deduced from them.

Thus stood the *Tutela Patronorum*:

*Ex eadem Lege XII. Tabb. Libertorum et Libertarum Tutela ad Patronos liberosque eorum pertinet, quae et ipsa legitima Tutela vocatur: non quia nominatim in ea lege de hac Tutela caveatur, sed quia perinde accepta est per Interpretationem, ac si verbis Legis introducta esset*¹.

It is of these Laws that *Ausonius* speaks:

*Jus Triplex, Tabulae quod ter sanxere quaternae, Sacrum, Privatum, et Populi commune quod usquam est*².

And *Horace*,

*Tabulas peccare vetantes, Quas bis quinque Viri sanxerunt*³.

² 2 Epist. I. 23.

The Tables themselves, according to some, were preserved entire as low as the age of *Diodorus Siculus*. *Η δὲ γραφεῖσα Νομοθεσία βραχέως καὶ ἀπερίττως συγκεμένη διέμενε θαυμαζομένη μέχρι τῶν καθ' ἡμᾶς καιρῶν*⁴. Tho' it may be questioned here, if *Diodorus* speaks of the *Original* Tables, or of a *Copy* or *Exemplar*, or lastly, of their use and authority.

⁴ *Diod. Sic. ad Olymp. LXXXIV.*

It

It appears on the other hand from *Livy*³, that they were destroyed^{VI. L} when Rome was sacked by the Gauls: and that the Romans were very industrious in repairing that loss from the Transcripts or Copies, which were left of them. Tho' I am sensible that this Passage has been differently understood.

Rittershusius upon the XII. Tables imagines, that the *Copies* did not survive the Irruption of the Goths, which I cannot comprehend, since the Comments of *Caius* were extant in *Justinian's* time: and I can hardly suppose the Comment without the Text.

Some People think they were extant upon Copper Plates in *St. Cyprian's* time, from an epistle of that Writer⁴. But the Text of that passage does^{II. 1.} not prove it.

The other Parts of which the Roman Law was composed, are particularly enumerated in the Institutes and Digest⁵, and in many other places,^{D. 1. 2. 2. 12. I. 1. 2. 3.} as we shall see more at large hereafter.

Some Laws were made in proper form by the whole Body of the Roman People, in whom this right resided. These were strictly and emphatically called *Leges*. Some by the Plebeians alone, as *Plebiscita*. The Senate contributed their *SCta*. Another species of Law arose from the *Jus Honorarium*, or the *Edicta Magistratum*, chiefly the Praetors: the *Auctoritas*, or *Responsa Prudentum*, was another source of Law, till at last all was swallowed up in the will of the Emperor, or the *Constitutio Principis*.

The progress of the Law from the time of the XII. Tables to the turn it took under *Augustus* or *Tiberius*, is described by *Tacitus*⁶. *Secutae*^{III. Annal. 27. 28.} *Leges i. e. post XII. Tabb. saepius per vim latae sunt, &c.* In this He agrees not with other Writers, who tell us, that the *Leges*, *Plebiscita*, and *SCta*, during the Commonwealth were frequently made with unanimity to revive the Constitution of the XII. Tabb. when they were reduced to desuetude.

Thus that part of them, which restrained Extravagance, lost their influence, till they were revived by *Sylla* the Dictator.

— *sumptuariis legibus, quas ex Rhetris Lycurgi et Axenibus [Solonis] Romam translatas diuque observatas, et senescentes paulatim reparavit Sylla Dictator*⁷.

For which reason, the *Vis*, or violence, mentioned by *Tacitus*, must be understood of that Contest, which indeed was very frequent, and in which it was disputed, not so much *what* should be enacted, as *who* should be the enacting Parties.

But by this means, in process of time, the Roman Law, like the Roman Empire (of which it is recorded, that *ab exiguis profecta initiis eo creverit, ut jam magnitudine laboret sua*) became too great and burdensome. This complaint was as high as the age of *Livy*:

*Immensus aliarum super alias accervatarum Legum cumulus*⁸.

This

⁷ Ammian. Marcellin. XVI. 5.

⁸ III. 34.

HISTORY OF

This put put several upon forming a design to reduce it into a regular System or Pandect, a work reserved for the Emperor Justinian.

Such were

M. CRASSVS,
SEXT. POMPEIVS,
SERV. SVLPICIVS.

according to *Van Leeuwen Hist. Jur. Civ.*

² D. 1. 2. 2.
³ 40. et 43.

Of these Lawyers mention indeed is made by *Pomponius*². But nothing there of this design appears. *Sulpicius* was one of those that wrote upon the XII. Tables, and was besides a voluminous author.

We read with more certainty of this Project being undertaken, tho' without success, by

POMPEY¹
C. IVL. CAESAR²,
CICERO³.

¹ Isidor. V.
Orig. I.
² Add. Marq.
Freher. Praef.
Jur. Gr. Rom.
H. Dodwell.
Appen. Praef.
Camd. p. 780.

What was done by *Vespasian*, *qui collegit omnes Leges et SCta*, seems rather to have been the work of an Antiquary, than a Lawyer.

³ Gell. I. 22.
⁴ Latini Pacati
Panegy. in
Theodof. Re-
nati Botterau
Hadrianus Le-
gislator Pictav.
1661. 8. Not.
ad Dionem
Cassium, Tom.
II. pag. 1165.
Edit. Nov.

The reign of the Emperor HADRIAN⁴ may be looked upon as a great æra in the Roman Law. *Hadrian* had been Quæstor [or Chancellor] under *Trajan*, and also had been employed in registering the decrees or acts of Senate⁵.

Of him is reported the famous Story of trying his Fortune by the *Sortes Virgilianæ*, when this passage turned up:

*Quis procul ille autem ramis insignis Olivæ,
Sacra ferens? Nescio crines incanaque Menta
Regis Romani, primam qui Legibus Urbem
Fundabit*⁶.

⁵ Spartian. in
Vita.
⁶ Virg. Aen.
VI. 809. de
Numa.
Spartian. in
Hadrian. c. 2.
⁷ Praelæct.
Camden. VII.
p. 294, seq.

For Numa was the Character, which Hadrian throughout his Administration, in the Tenor of his Legislation and Politics more particularly affected. See this subject handled at large by *Dodwell*⁷. And what adds much to his Legislative Character, is a circumstance recorded by *Eusebius* in his *Chronicon*, viz. That he gave the City of Athens a system or body of Laws, and so discharged the Debt which Rome stood bound for.

Hadrian renewed the Office or Grant *Respondendi de Jure*, which made a considerable branch of the Roman Law, and which had sunk or been much neglected between his time and that of *Augustus*⁸.

⁸ D. 1. 2. 2.
ult.

In his time and by his order, was drawn up the famous *perpetual Edict*, by *Julian* a Roman Lawyer; a kind of system of Roman Law, however the original Plan, upon which the Emperor Justinian afterwards formed his design. Of this more hereafter in a more suitable place. It is sufficient here to know, that it was digested into fifty Books, and consisted of a distribution or series of Law, very much commended by *Cujacius*, and which

which is that very Distribution, into which the Emperor threw his Digests, and in which he was followed, as far as was practicable, in the Compilation of the Decretals also, and by all the Canonists afterwards⁸: But this is disputed by *Bynkershoek*⁹, and others.

*Ea, quae Hadrianus Romanorum Imp. collegerat accipiens [Justinianus] eaque in libros redigens, proprium et separatum opus confecit, Digestorum seu Pandectarum nomen ei jam ponens*¹.

The Fragments of this Edict are exhibited by *Gothofredus* in his *Quatuor Fontes Juris Civilis*. It is also published under this Title, *Salv. Juliani Icti Edictum perpetuum, cum variis Lectionibus Gul. Ranchini*². See also *Gothofred's* Edition of the *Corpus Juris Civilis*³, at the head of the Digest: and *Van Leeuwen. Collect. Scriptor. de Orig. J. C.*⁴

There is another thing very remarkable of this Period, viz. That in the Pandect (which is a series of Law, drawn from the writings of the Roman Lawyers) there are but few Authors, above the Age of *Hadrian*.

And in the Code (which is a collection of the Imperial Decrees or Constitutions) there is no one Constitution, prior to the Age we are speaking of. For indeed about this time they began, at least, effectually.

When the Roman Constitution became Monarchical, the people passed over all their rights to the Emperor, by an instrument called the *Lex Regia*. So that put an end to *Leges* and *Plebiscita*. The Emperors for some time kept up the form of *SCta*. But about this time upon publishing the perpetual Edict, there were few Laws, but by the Emperor's Authority. *Radiabant solummodo Imperiales Constitutiones*. And this will help us to understand (what I apprehend relates to this Period) the following Passage:

*Totam illam veterem et squalentem legum sylvam novis Principalium et Edictorum securibus truncantes*⁵.

But farther, these considerations will help us to understand that famous distinction by which the Roman Civil Law is divided into three Stages or Periods,

Jurisprudentia { *Antiqua*
Media
*Nova*⁶

The *Jurisprudentia Antiqua* was the Face of the Roman Law, from the foundation of the City, as low as the XII. Tables.

The *Jurisprudentia Media* takes in the Period between the XII. Tab. and the Age of *Hadrian*, at which time the *Leges*, *Plebiscita*, *SCa*, &c. seem to have given place to the Imperial Constitutions, if not totally, at least in great measure.

This disposition is supported by *Cujacius*, *Hotoman*, and *Pacius*: and *Justinian* seems to give his testimony to it very fully:

*Media Jurisprudentia, quae erat quidem lege XII. Tabularum junior, Imperiali autem dispositione anterior*⁷.

Authors⁷ L. 3. 2. 3.

⁸ D. 1. 6. 2.
C. 1. 17. 1. 5.
C. 4. 5. 10.
Gothofred.
Proleg. ad C.
Theodos. c. 1.

⁹ II. Observ.
25.

¹ Prooem. Basilic. Lat.

² Par. 1597.8.

³ Amst. 1663.
Fol.

⁴ Rom. 1672.
8.

⁵ Tertullian.
Apolog. Cap.
IV.

⁶ I. 3. 2. 3.
Dodwell.
Prael. Camd.
VIII. p. 319.
Perizon. ad L.
Vocon. p. 19.
8.

Eck. ad D. 1.
2. 2. 46.
Heinecc.
Elem. Instit.
§ VI. * and
Antiq. Rom.
L. 1 Tit. II.
§ 28.

Authors are greatly divided about these three Stages: We shall see them all, if we do but collect the sentiments of each concerning what was the *Jurisprudencia Media*. For that will mark out the other two.

Opin. 1. *Jurisprudencia sub libera Rep.*

2. *Ab Hadriano ad Constantinum M.*

3. *Disputatio Fori*¹.

4. *Jurisprudencia sub Hadriano Imp.*

5. *Jurisprudencia post Trajanum Imp.*

¹ See D. 1. 2.

2. 5.

Something of this Emperor's merits in the Roman Law, may be gathered from the *Responsa et Rescripta Hadriani*, collected by *Dositheus* a Grammarian, and published by *Goldastus* Gr. & Lat. The reader will find them in *Anton. Scultingii Jurisprud. Vet. ante Justinianea*². He will see an account of them in *Cujacius*³ and *Reinesius*⁴.

⁴ Lugd. Bat.

1717. 8. pag.

155—879.

⁵ XXI. Ob-

ferv. 5—7.

¹ Defens.

Var. Lect.

pag. 90.

Between the Age of *Hadrian* and *Justinian* there were several designs towards collecting the Roman Law. There is mention made both of a Code and Pandect compiled by *Hadrian* himself. The Author indeed, *Matthaeus Blastares*, is but of little authority, and a late one, viz. of the XIVth Century. His words I shall transcribe:

Ταῦτα πάλιν ὁ πολὺ μετὰ Αὐγέστον ἄρξας Ἀδριανὸς ἀθροίσας εἰς ἓν, τὰ μὲν τῶν ἄλλων πάντων ἰδίαν ἐποίησατο πραγμασίαν ἐν ΒΙΒΛΙΟΙΣ θεωρημένην ΠΕΝΤΗΚΟΝΤΑ, ΔΙΓΕΣΤΑ τέτοις ἦτοι ΠΑΝΔΕΚΤΗΝ ὀνομαζέμεν, ὡς ἐκ πολλῶν δηλαδὴ συλλεγένη· ἰδίᾳ δὲ ὅσα οἱ βασιλεῖς διώρισαντο, ἐν ΒΙΒΛΙΟΙΣ ἔγραψε ΔΩΔΕΚΑ, ἅπερ ὠνόμασε ΚΩΔΙΚΑΣ, ἦτοι βασιλικὰς διατάξεις.*

² Matth. Bla-

star. Praef.

Nomocanon.

This is a plain description of what was executed by *Justinian*; and by the great distance here from *Augustus*, πολὺ μετὰ Αὐγέστον ἄρξας, it may have been meant for him. Yet he is mentioned below in his proper place, and is there said to have translated into Greek what had been done by *Hadrian*. The mistake probably arose from the perpetual Edict of *Hadrian*, which was the basis of *Justinian's* enterprize.

Some people are of opinion, that there was a *Codex Papyrianus*, a collection by *Papyrius Jusus* of the Constitutions DD. Fratrum M. Antonini et Veri, in XX. Books. What it was, we know not exactly. Thus much is certain, that XX. Books of Constitutions are mentioned under his name, in the List of Lawyers, at the Head of the Pandect: and his First, Second and Eighth Books are cited in the Body of the Pandect.

³ D. 8. 2. 14

D. 42. 1. 35.

D. 2. 14. 60.

He flourished under *Marcus* and *Commodus*. See *Anton. Augustin. de Nomin. propriis Pandectarum*.

* Haec iterum Hadrianus, qui multo post Augustum imperavit, in unum colligens, aliorum quidem omnium praescripta unum opus effecit, in L. libros distributum, Digesta sive Pandectam ab eo nominatum, ut quae ex multis collecta sunt. Quaecunque autem Imperatores privatim [singulatim] decreverant, in XII. Libris scripsit, quos Codices sive constitutiones Imperiales nominavit.

That

There was another Codex of *Julius Paulus*, who collected the Imperial Constitutions (or rather Decrees in Judgment, *Imperiales Sententias in Cognitionibus prolatas*) in six Books⁴. And many Lawyers were Authors of Digests, as we shall see a little below.

⁴ D. 35. 1. ult.
See Cujac. II.
Observ. 26.
Merill II.
Observ. 26.

CODEX

GREGORIANVS ET HERMOGENIANVS.

Under *Constantinus M.* flourished two great Lawyers, *Gregory* and *Hermogenes*. The former *Gregorius* (or *Gregorianus*, if it be the same person mentioned by *S. Austin*, *Epist. ad Pollentiam*⁵, *Legi apud Gregorianum*) was *Praefectus Praetorio* to that Emperor, and by his own authority collected the Imperial Constitutions from *Hadrian* to *Dioclesian*⁶. He was followed by his Continuator *Hermogenes* or *Hermogenianus*, who carried down the Work to the time of *Constantine*.

⁵ II. 8.
⁶ See Jac. Gothofredi Prolegomena ad Cod. Theodos. p. 183, seq.

These Collections were called the *Codex Gregorianus* and *Codex Hermogenianus*.

The term *Codex* has been long appropriated to the particular signification of such Collections of Law: οἱ τῶν Νομοθετῶν Κώδικες⁷.

⁷ Evagr. Hist. Eccl. I. 12.

Caudex ob hoc ipsum appellatus, quia plurium Tabularum contextus Caudex apud antiquos vocabatur. Unde Publicae Tabulae Codices dicuntur.

Isidor. Pelusiot. IV. Epist. 91.

The Fragments of these are collected by *Ant. Schultingius*, in his *Jurisprudentia Vetus ante-Justiniana*⁸.

Schulting. Jurispr. ante-Justiniana, p. 377.

But these Books wanting authority, were soon neglected, and gave place to

Salmaf. de Modo Vfurarum, p. 404. seq.

CODEX THEODOSIANVS.

This Code is extant in sixteen Books, with an useful Comment of *Gothofred*⁹, and has been reprinted.

Matth. Blastares, cited a little above.

It was the younger *Theodosius*, who about the year of Christ 435. gave orders for a Collection of the Imperial Constitutions from *Constantine* to his own time, A. C. 312—438.

⁸ Senec. de Brevit. Vitae § 13.

This Code was confirmed, or received the Imperial Sanction, in a Novel Constitution of the same Emperor, A. 438.

⁹ p. 681—718. Lugd. 1668. Fol.

Novels are additional and supplementary Constitutions, suited to particular emergencies, and added in the order they were enacted.

Of the Novels of *Theodosius*, and other Emperors, antecedent to *Justinian*, see *Fabric. Biblioth. Gr.*², and the edition of them by *Pithecus*.

² Lib. VI. cap. VI. § 6.

Thus voluminous grew the Law, which was, according to *Eunapius* (who lived at this Period) in his life of *Aedestius*³, αἰχθὸς Καμήλων³ pag. 92. πᾶλλων.

Within a Century more we come down to *Justinian*, whose first work was a *Code*.

CODEX IVSTINIANI IMP.

From the three Codes abovementioned, viz. the *Gregorian*, *Hermogenian*, and *Theodosian*, together with the Novel or Supplementary Constitutions, *Justinian*, A. 528. set about reforming the Law. See his *Constitut. de novo Codice faciendo*, at the beginning.

It was finished VII. Id. Apr. 529. and intitled, *Codex Justinianeus*. See the *Constit. de Justin. Cod. Confirmando*.

His next care was the

DIGESTS or PANDECTS¹.

In the year 530, he issued out his decree for reducing into a system, the writings of the Lawyers before his time, reserving only what was useful, and omitting the obsolete, unnecessary, and contradictory passages.

The Contents of those Books of the Lawyers are thus expressed,

Librorum duo millia, versuum autem tricies centena².

Ad duo millia, pene librorum, et trecentas myriadas versuum pertingebat³.

Duo pene millia librorum esse conscripta, et plus quam trecentiens decem millia versuum a Veteribus effusa⁴.

This Work was assigned to *Tribonian*, an eminent Lawyer, the *Magister Officiorum*, *Exquaestore Sacri Palatii*, and *Exconsule*.

Much has been said in abatement of this Man's character, in regard to faithfulness, as well as sufficiency. So that *Tribonianism* became a term of Reproach. *Procopius* among the Ancients, and *J. Fr. Ramos*, a Spanish Lawyer, among the Moderns⁵, *Hotoman* in his *Antitribonianus*, and *Jo. Jac. Wissenbachius* in his *Emblemata Triboniani*, have attacked him with the greatest warmth. However he has found some Advocates. The Accusation against him has been very well fancied, in the following words, after the manner of a Roman Libel,

Q. MUCIO P. F. SCAEBOLA II. C. AQVILIO M. F. GALLO COSS. IV. ID. DECEMB. APVD AEMILIVM PAPINIANI HOSTILII F. PAPINIANVM PRAEF. PRAET. IVRISC. ADVERSVM TRIBONIANVM MAGISTRVM EX CONSVLE ET EX QVAESTORE SACRI PALATII SVB FLAVIO IVSTINIANO CAESARE IN RATIONIBVS PVBLICIS ADSISTO ET DICO AC PROFITEOR ILLVM IN COMPILATIONE DIGESTORVM ET CODICIS IMPERITIA FRAVDE ET DOLO MALO VIOLASSE ATTRECTASSE CORRVPISSE SANCTISSIMAS LEGES S. P. Q. R. QVIRITVM EVMQVE HOC NOMINE REVM DEFERO ET ACCVSO EX LEGIBVS CORNELIA DE FALSO ET IVLIA MAIESTATIS POSTVLOQVE EIVS RECIPI NOMEN IN PVBLICVM ATQVE IN CRIMEN MANV PROPRIA ME SVBSCRIBO.

EGO ILLE BARNABAS BRISSONIVS REGII CONSISTORII CONSILIARIVS AMPLISSIMI⁶ SENATVS PARISIENSIS PRAESES, &c.

¹ See § 2.

Proem. Instit.

² l. Omnem

§ 1. De Concept. Dig.

³ C. 1. 17. 3. 1.

⁴ l. 2. § 1. cod.

Concerning

the meaning

of *versus*, whe-

ther lines or

paragraphs,

see Gothofred.

ad C. 1. 17.

2. 1.

Styck. Prae-

cogn. Juris-

prud. Cap. II.

§ 8.

Contii Lect.

Subseciv. l. 8.

Casaub. ad

Athen. VI. 10.

Menag. ad

Laert. lib. 7.

n. 33.

Montauc.

Palaeograph.

l. 4.

Corn. Nep.

XV. 4. et

Comment. ad

loc.

Barthii Ad-

versar. LIV.

21. 22.

Comment.

Marm. Sand-

vic. pag. 24.

⁵ § 4. Proem.

Instit.

⁶ J. Fr. Ramos

Tribonianus,

sive Errores

Triboniani de

poena Parrici-

dii, Lugd. Bat.

172. 4.

He took to his assistance sixteen other Lawyers, and tho' ^{he} ~~we~~ was allowed ten years for the execution, he huddled it up in three.

The names of the Lawyers, from whose works the Digest is compiled, are set at the head of each Law, with the name of their Book. And their own words are retained, as far as was consistent with the scheme proposed.

Much may be learned of the History and Merits of these Roman Lawyers (and others not here mentioned,) from *Bertrand*, *Hotoman*, *Bern. Rutilius*, *Gul. Grotius*, and others, who have wrote their Lives; from *Pomponius*⁷ and his Commentators; from *Taisand*, *Gravina*, *Hei-*⁷ D. 1. 2. 2.
neccius, and from the elegant hand of *Menage* in his *Amoenitates Juris*³⁶. 1699.
*Civilis*⁸.

⁸ Lutee. Paris.

The Civilians hold the language of this book to be so pure that the Roman Language might be fairly deduced from it, were all other Roman Writers lost.

1664. 8.

And there have been Civilians on the other hand, who maintain both Code and Digest to be a barbarous Latin Version of a Greek Original⁹.
Concerning the Hellenisms of the Digests, See *Bynkershoek*¹, *Donell.*² *Edm. Merill*³, *D'Arnaud*⁴, and others. Take this for an example: ⁹ Jenfi Stri-
² Euræ Juris
³ Romani.
⁴ Praef.

*Sin vero dotem ita dissipaturus ita manifestus est, ut non hominem frugi*¹ VIII. Obs.
*oportet*⁵, — φανερός ἐστὶ διασκεδάσων.¹⁵

And this:

Aestimatis rebus in dotem datis pactum intercessit, ut ex quacunque
causa dos reddi deberet, ipsae res restituerentur, habita ratione au-
gmenti et deminutionis, viri boni arbitrato: quae vero non exsta-
*rent [ab initio] aestimatio eorum*⁶.
³ III. Observ.
³³.
⁴ 1. Var. Con-
⁵ D. 24. 3.
²². 8.

Here if my Author be right, the Editors must be wrong, who have inclosed between two hooks, as desperate, those unluckly words [*ab initio*.] Τὴν ἀρχὴν, says he, in the supposed Greek Text of the Pandect, ought to have been rendered *omnino*, not *ab initio*, (of which Idiom I have spoken largely in my Notes upon *Lyfias*⁷) and, according as you please to stop the passage, the Translation to have run,
⁷ pag. 163.
Edit. Lond.

—*quae vero omnino non exstarent, aestimatio eorum* [reddenda est scil.]

Or,

—*quae vero non exstarent, omnino aestimatio eorum*.

And this last is confirmed by the words of another Law, *Sed si res non exstet, aestimationem omnimodo maritus praestabit*⁸.
⁸ D. 23. 3. 10.
⁶.

So again, *Si turpis aut difficilis sit conditio—remitti eam ab initio visum est*⁹. Or rather, upon this system, τὴν ἀρχὴν, or, *omnino*.
⁹ D. 36. 1. 63.
⁷.

There is a very good and entertaining History of this Pandect¹, more particularly with regard to a MS Copy of it, preserved with great care at Florence, and which *Politian*² and others fondly imagined to be the very Original. However its Age is very high, and its Merits considerable. For it is held, that all other Copys now extant are but Trans-

¹ Hen. Brencmanni Historia Pandectarum, seu Factum Exemplaris Florentini. Traj ad Rhen. 1722. 4.

scripts² X. Epist. 4-

³ See a Dissertation of
Christ. Gottl.
Schwarz. An
omnia Pandectarum Exemplaria e
Florentinis manaverint?
and Brencman. III. 2.

⁴ D. 20. 5.

7. 2.

⁵ Freheri

Theatrum.

Tom. II. Par.

II. Sect. IV.

⁶ Flor. 1553.

Fol.

⁷ See Taurelius Praef. Edit. Pandect.
Bynkershoek Praetermiff.
ad l. de O. I.
§ 2.

Best Ratio Emendandi Leges. C. 1. § 4.

⁸ D. 1. 2. 2. 11.

⁹ D. 4. 9. 1.

pr.

¹ D. 21. 2. 37.

1. Add. D. 1.

3. 32. et 1. 16.

9. 2. et 12. 2.

11. 3. etc.

² D. 31. Lex
8. § 1.

³ I. Analect. 1.

Where may be seen more instances of this kind of Resitution.

⁴ D. 39. 1. 3. 1.

⁵ De Confuetud. c. Nullus. verb. Ante Annuntiationem. And again,

De Constitut.

c. Quia Incontinentia. verb.

Praecipimus.

scripts of this³: And also that the discovery of this Book in the 12th Century contributed much to the revival of the Justinianean Civil Law in the West, which yet is much controverted. It is however of that authority, that in disputes concerning the true reading of the Text of Law, it has been solemnly appealed to, and its decision as formally admitted.

Fuit vehemens altercatio inter eosdem [Baldum scil. et Bartolum] in Textu, § ult. l. Si Creditor⁴, cum Bartolus in suo Codice haberet nullam venditionem, Baldus vero ullam venditionem: adeoque tum animi exarserunt, ut missum sit Pisas, et veteres Pandectae sint inspectae, quae cum Codice Bartoli consonarunt⁵.

This Copy has been represented with the minutest exactness in a fine Edition set out by *Franc. Taurellius*⁶, which is one of the Glories of the

Prefs. When I mention the accurateness of this Edition, I cannot omit the singularity of the Scribe in a compendary way of writing, that is practised in no other MS that I know of⁷. And it is this: The Copyist to save time and labour frequently contrived, when one or more Letters, Word, or Words were immediately repeated in the Text, to describe them but once, and leave the Reader to make it out in the best manner he could. This led the Editor of the *Flor. Pandect.* to distinguish those Letters from the rest, either by printing them in Capitals, if the others were minusculae, or minusculae vice versa. Thus *nec ESSEt* for *neceffe esset*⁸. And

*Ait Praetor, NAVTAE, CAVPONIS, STABVLARII, QVOD CVIVS-QVE SALVVM FORECEPERINT NISI RETITVANT, IN EOS IVDICIVM DABO*⁹.

So again:

*De his rebus quae pretiosior ESsent*¹.

I mention this the rather, because much use may be made of the Observation. For instance, the MSS represent constantly the following passage thus:²

*Si ita legetur: Sempronio decem, aut, si noluerit, hominem Stichum lego: hoc casu duo legata sunt, sed uni contentus esse debet*²

*Josephus Neri*³ doubtless hit off the mistake, when he resolves it into the compendary way of writing, that we have been speaking of, viz. *uniContentus esse debet*.

Thus we read without hesitation, and all the printed Copies have it, *Si in loco communi quid fiat, nuntiatio locum habebit adversus vicinum*⁴.

Where MS *Flor. locomuni*: Edit. *Taurel. loCommuni*. In short that industrious Editor has advertised his Reader in many places to be upon his guard, but left a great number untouched, which are reserved for those that come after him.

But enough of this, lest my great Master, *Lyndwood*, should reprove me, who lays it down for Law, that *Legum Correctio est vitanda*⁵.

Besides

THE ROMAN LAW.

21

Besides the division of the Pandects into fifty Books, which now prevails⁶, there was also a superstitious septenary Division by *Justinian* himself, which stands thus,

I. Libb. Pandect. — I ——— IV inclusive.
 II. ——— V ——— XI.
 III. ——— XII ——— XIX.
 IV. ——— XX ——— XXVII.
 V. ——— XXVIII ——— XXXVI.
 VI. ——— XXXVII ——— XLIV.
 VII. ——— XLV ——— L⁷.

Not to mention a Division, which was owing to a barbarous Age, and perhaps to the accidental distribution of a Bookbinder.

Digestum Vetus ——— I ——— XXIV. tit. 2.
Infortiatum ——— XXIV. tit. 3. ——— XXXVIII.
Digestum Novum — XXXIX ——— L⁸.

INSTITUTES.

The Pandect was finished A. C. 533. but before the promulgation of it, the Emperor gave Orders to the same *Tribonian* with *Theophilus* and *Dorotheus*, to draw up the Elements, or first principles of the Roman Law, from his Code and Pandect, and the Institutes of former Lawyers⁹.

*Ex omni pene Veterum Institutionum Corpore elimatas, et ab omnibus turbidis fontibus in unum liquidum stagnum derivatas*¹.

(For besides the Institutes of *Caius*, which are now in some measure extant, we read of the Institutes of *Paulus*, of *Ulpian*, of *Callistratus*, of *Florentinus*, and *Marcian*. Thus the Emperor called his Code after those who had published such collections before him: and his Digests², upon the plan of other Lawyers, who had published Digests also, as *Alfenus*, *Julianus*, *Celsus*, *Marcellus*, *Ulpian*. &c. So *Modestinus* had his Pandects.)

This was accordingly effected, and the Institutes were published XI. Kal. Decemb. 533. and the Digests in the Month following.

So that the Institutes are prior to the Digests in order of publication, but later in order of composition. But the sanction or authority of both bears date the same day, III. Kal. Jan³.

See an example, where the Institutes are interpreted or corrected by the Digests⁴.

They are called *Prima Legum cunabula*⁵.

*Totius Legitimae Scientiae prima elementa*⁶.

*Cunabula Juris et prima Legum Audientia*⁷.

But more frequently *Institutiones*⁸.

—— *Siquid aliud a nobis fuerit promulgatum, Institutionum vicem obtinens; ut rudis animus studiosi simplicibus enutritus, facilius ad altioris prudentiae redigatur scientiam*⁹.

⁶ And is mentioned,
 C. 1. 17. 1. 5.
 ——— 2. 1.
 ——— 3. 1.

⁷ C. 1. 17. 2. 1.
 seq.
 C. 1. 17. 3. 1.
 seq.

⁸ Accurf. ad
 tit. D. Sol.
 Matrim.
 Gothofred.
 ibid.

Alciat. Pa-
 rerg. IV. 25.
 Contii Praef.
 Dig.

Coras. Miscell.
 VII. 22.

Ferrand. Ex-
 plic. I. 23.

⁹ § 3. Prooem.
 Inst.

¹ § 2. Constit.
 Omnem.

² Concerning
 the titles Di-
 gest or Pan-
 dect, see Jos.
 Nerius Ana-
 lect. I. 38.

³ C. 1. 17. 2.
 pen.

Paulus Dia-
 conus I. 25.

⁴ Hoppius ad
 Inst. 2. 1. 25.

Stryk. Prae-
 cogn. Jur.
 Cap. II. § 12.

⁵ Inst. Prooem.
 § 3.

⁶ ibid. § 4.

⁷ C. 7. 25.
 unic.

⁸ Inst. Prooem.
 § 3.

⁹ C. 1. 17. 1.
 11. Add.

Laflant. I. 1.

Barth. Adver-
 sar. II. 17.

Valla Eleg.
 L. L. V. 11.

CODEx

HISTORY OF CODEX REPETITAE PRAELECTIONIS.

After the publication of these, new questions arising, and new decisions being given by the Emperor, either not comprehended in the former Code, or those that were, wanting correction, He ordered a *new Code* to be composed⁴.

⁴ See the Constitution, *Cordi nobis est*, de Emendatione Codicis, at the head of the present Code.

It was published XVI. Kal. Dec. 524. and the former declared to be of no farther Authority. Which therefore soon began to be forgotten.

NOVELS.

Of the *Novellae Constitutiones* of *Theodosius* we have spoken above. Such are these of *Justinian*, who surviving his Collection of Law some Time, new questions wanted to be decided, or corrections of the old Law, when useless or contradictory, became necessary.

These Novels of *Justinian*, or Codex Novellarum, are digested into no certain order, nor bear date at one time, but as emergencies called for them, from the publication of the last Code, down as far as 557, as *Contius* concludes from the subscription of the 142^d Novel⁵.

⁵ Add Matth. Steph. Prooem. Novell. n. 24.

It is probable that most of them were enacted between the years 535, and 542.

The original Text of the Novels, or most of them, was Greek. Of which there are several Versions, the old or vulgate, a more elegant one of later date, by *Haloander*, another by *J. Frid. Homberch*⁶. But the old one is the only authentick one⁷.

⁶ Marp. 1717.

⁷ Alb. Gentil.

de lib. J. C.

Cap. 7.

A. Duck. de

Auct. J. C. I.

4. 16.

Novel 9. 11. 23. 62. 143. 150. were wrote originally in Latin: and the purity of the Language shews it.

So that the Corpus	{	Institutes
Juris		Pandect or Digests
Romano-Civilis		Code
is		Novels.
made up of these Books.		

Besides these there are others of great use in the study of the Civil Law.

I.

The *Jurisprudentia Ante-Justiniana* collected and well published by *Simo Leeuwius* in his *Fragmenta Juris Civilis*, and by *Schultingius*.

These are some Fragments of the old Lawyers before the time of *Justinian*, which came down to us (for the publication of his Corpus strangled all the rest) and are

1. The

1. The Institutes of *Caius*, in two books: doubted if that *Caius*⁸, who is mentioned by the Emperor, *Prooem. Instit.* and called *Caius noster*⁹
2. Some Fragments of *Vlpian*. Of their Merit see *Balduini Praef.* ad LL. XII. Tabb.
3. *Sententiae Pauli*.
4. *Collatio Legum Mosaicarum et Romanarum*. Of an Age and Author uncertain¹.

These have no authority, not being confirmed as the *Corpus Juris Civilis* is: and moreover they are supposed to be of a bad Original, being only Extracts made, by order of *Alaric K.* of the *Goths*, out of some Books then in being, and much interpolated by *Anianus*, who had this Extract in Commission².

That these Pieces together with the Theodosian Code happened to come down to us, is owing to this Circumstance: That the Theodosian Law (as distinguished from the Justinianean) together with the Writings of these Lawyers was received by the Franks and Goths, who over-ran the Western part of the Roman Empire, and founded their respective States: at the time that Sicily and part of Italy and Africa, which was all the Romans had left Westward, were directed by the System of *Justinian*, to whom they were subject.

II.

A Greek Version, or rather Paraphrase, of the Institutes by *Theophilus*, by some supposed the Person mentioned by the Emperor *Prooem. Instit.* but by *Cujacius* and others, one who lived somewhat later³.

*Quo libro nullus exstat ad Justiniani libros intelligendos aptior*⁴.

By this paraphractical Version the sense is seen, in which *Justinian* was understood at the time when *Theophilus* wrote.

Of this a Latin Translation has been made, and found to have a good success in accompanying *Justinian's* Institutes.

An excellent Edition published 1752, of *Theophilus*, Gr. Lat. with various Lectures, Notes, &c. in two Volumes 4^{to}.

III.

The *Basilica*, or *Jus Graeco-Romanum*, composed in the ninth and tenth Centuries, in emulation of *Justinian* by *Basilius Macedo*, Imp. and his Sons *Leo* and *Constantine*⁵.

It was a Collection of Law for the use of the Eastern Empire, compiled out of the several Greek Versions of *Justinian's* *Corpus*, and other Books of Law, which prevailed in those parts: was published in XVI Books by *Annib. Fabrottus*, Gr. Lat.⁶

These Books were never received in the West, and are consequently of no Authority there; but however have their use and value in comparing and explaining.

⁸ See Schulting. Jurisprudentia Antea Justinian. and Meerman. Specimen Animadv. Critic. in Caium. Tom. VII. Thesaur. J. C. init.

⁹ Ever. Otto Thes. J. R. Tom. I. Praef. Id. ad Prooem. Instit.

Anton. Augustin. V. Emend. 1.

¹ See Menag. Amoenit. J. C. Cap. 7.

² Gothofred. Bibl. Jur. C. 2. pag. 49.

Anton. Augustin. de LL. et SCtis.

³ J. Hen. Myllii Historia Theophili. C. 3. § 4.

Anton. Augustin. III. Emend. 8.

Fabrot. Praef. ad Paraphr. Theophili.

Cujac. ad Instit. 1. 11. 2.

Otto ad Prooem. Instit. pag. 16.

Triv. Observ. Apolog. XXXIII.

5. et 6. apud Ottom. Thesaur. Jur.

Rom. Tom. I.

Gundlingiana P. II. Obf. 2.

⁴ Anton. Augustin. I. c.

⁵ Cujac. VI.

Obferv. 9.

Jac. Gothof. Hist. Jur. c. 6.

⁶ Par. 16. 17.

It Fol. Vol. VII.

It is unnecessary therefore to continue the account of the Greek Law till the loss of the Empire, as it was propagated by the Writings of *Mich. Ataliota, Psellus, Balsamon, Harmenopulus*, and others.

Before I close this History, let me add a word or two about the method of citing the Law Books.

I. Institutes.

D. Digests.

C. Code.

N. Novels.

* Concerning which see Porta de occultis literarum notis.

Herm. Hugo de prima scribendi origine. cap. XXI.

Gothofred.

Not. ad Hist.

Jur. de Concept. Dig.

Coras V. Miscell. 15.

Valla in Raudenssem. pag. 85.

Scopp. Coll. I.

9. apud Gruter. Thef. Crit.

Tom. I.

Barth. Adversar. II. 17.

Baud. Cent. I.

Epist. 97.

Vossius de Idololatr. IV.

96.

Cujac. XII.

Observ. 40.

Disney's Preface to his Collection of Laws.

Schard Lexicon Jurid. V.

DIGESTA.

Fabri Thefaur. L. I.

titinae. ad init.

Lit. F.

Alciat. III.

Dispunct. 16.

Argol. in Panvin. de Lud.

Circens. I. 17.

Walther. II.

Miscell. 4.

7 Cujac. XII.

Observ. 40.

The *Digests* are also frequently described by the Greek π or Capital Π , or by double f, thus ff⁶.

It may perhaps be only the Corruption of some arbitrary Note of a Scribe, which had no meaning or foundation at first⁷.

The *Institutes* are divided into four *Books*: each *Book* into a number of *Titles* or *Chapters*: and each *Title* into *Paragraphs* (of which the first is not numbered) and described thus: §.

pr. I. de Nuptiis.—Inst. Lib. I. Tit. X. princip.—I. 1. 10. pr.

§ 2. I. de Nuptiis.—Inst. L. I. Tit. X. § 2.—I. 1. 10. 2.

The *Digests* are divided into fifty *Books*: each *Book* into several *Titles*: each *Title* usually distinguished and numbered into several *Laws*, and sometimes one *Law* into *Princ.* and *Paragraphs*. The modern way of citing is thus:

D. 1. 1. 5.

i. e. *Digest*, First *Book*, First *Title*, Fifth *Law*.

And if the *Law* is divided into *Paragraphs*, a fourth number must be added.

D. 48. 5. 13. pr.

Or, D. 48. 5. 13. 3.

Antiently thus: l. 30. D. de R. J. or, *Regulis Juris*.

or, l. *Legatum*. D. de Capite minutis.

or, l. *Absentem* 5. D. de Poenis.

In the first of these instances is quoted the thirtieth *Law* of the *Title* in the *Digests de Regulis Juris*.

(The Names of the *Titles* were formerly so familiar, that the mention of them suggested to the Reader the Number both of *Book*, and *Chapter*, or *Title*.)

And therefore, as this method sometimes prevails, there is now generally an Alphabetical Index of all the *Titles*, at the Head of the best Editions of the *Corpus Juris Civilis*.)

In the second instance, the first Word of the *Law*, not the Number, is cited.

And

(And this is agreeable to the practice of former times: when Books, or Sections of Books, were known and quoted by the first Words. It obtained much in the Church, and we retain it in *Te Deum*, *Jubilate*, *Nunc dimittis*, &c. Thus that Hymn, which sometimes makes a part of the Morning Service, was always known by the name *Benedicite*: and the Initials of the Psalms in the Vulgate Translation, still keep their place in the English Liturgy. Thus the Jews called the books of their *Pentateuch* by the Word that stood first in each of them. Thus the Pope's Bulls, as *Vnigenitus*, and such like: and anciently the Praetors' Writs: *Si certum petatur — Vtrubi — Vnde vi — and Vti possidetis*, the last of which ran thus at large:

VTI EAS AEDES Q. D. A. NEC VI NEC CLAM NEC PRECARIO A. A. A. POSSIDETIS QVO MINVS ITA POSSIDEATIS VIM FIERI VETO^s.)

^s D. 43. 17. 1.
pr.

In the *third*, both Word and Number.

But be it noted:

Sometimes a Number added to a Word signified, that there were more Laws than one under the same Title, beginning with the same Word, as

l. Maritus. 1. D. Solut. Matrim. — D. 24. 3. 52.

l. Maritus. 2. D. Solut. Matrim. — D. 24. 3. 54.

The Abbreviation *arg.* before a Quotation implies, that the Text or Law produced is not a *direct* but a *consequential* proof.

I need not mention, that *cod.* (i. e. *codem Titulo*) refers us to the Title last quoted.

The Code is cited in the same manner as the Digests, *viz.* by *Book*, *Title*, and *Law*.

The Novels are cited by their Number, the Chapter of that Number, and the Paragraphs (if any); as,

Nov. 115. c. 3.

P R O O E M I V M
D E
C O N F I R M A T I O N E
I N S T I T V T I O N V M.
I N N O M I N E
D O M I N I N O S T R I I E S V C H R I S T I.

*Imperator Caesar FLAVIVS IVSTINIANVS, Alamanicus,
Gotthicus, Francicus, Germanicus, Anticus, Alanicus, Van-
dalicus, Africanus, Pius, Felix, Inclytus, Victor ac Trium-
phator, Semper Augustus*

CVPIDAE LEGVM IVVENTVTI S. D.

IMPERATORIAM Majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus, et bellorum, et pacis recte possit gubernari: et Princeps Romanus non solum in hostilibus praeliis victor existat, sed etiam per legitimos tramites calumniantium iniquitates expellat, et fiat tam juris religiosissimus, quam victis hostibus, triumphator magnificus.

§ I. Quorum utramque viam cum summis vigiliis, summaque providentia, annuente Deo, perfecimus. Et bellicos quidem sudores nostros Barbaricae gentes sub juga nostra redactae cognoscunt: Et tam Africa, quam aliae innumerae provinciae, post tanta temporum spatia, nostris victoriis a coelesti numine praestitis, iterum ditioni Romanae, nostroque additae imperio protestantur. Omnes vero populi legibus tam a nobis promulgatis, quam compositis reguntur.

§ II. Et cum Sacratissimas Constitutiones antea confusas in luculentam ereximus consonantiam, tunc nostram extendimus curam ad immensa veteris prudentiae volumina, et opus desperatum quasi per medium profundum euntes, coelesti favore jam adimplevimus.

§ III.

§ III. Cumque hoc, Deo propitio, peractum est, Triboniano viro magnifico, Magistro et Exquaestore sacri palatii nostri, et Exconsule, necnon Theophilo et Dorotheo, viris illustribus, Antecessoribus (quorum omnium solertiam, et legum scientiam, et circa nostras iussiones fidem jam ex multis rerum argumentis accepimus) convocatis, mandavimus specialiter, ut ipsi nostra auctoritate, nostrisque suasionibus Institutiones componerent: ut liceat vobis prima legum cunabula, non ab antiquis fabulis discere, sed ab Imperiali splendore appetere: et tam aures, quam animi vestri nihil inutile, nihilque perperam positum, sed quod in ipsis rerum obtinet argumentis, accipiant: et quod priore tempore vix post quadriennium prioribus contingebat, ut tunc Constitutiones Imperatorias legerent, hoc vos a primordio ingrediamini, digni tanto honore, tantaque referti felicitate, ut et initium vobis et finis legum eruditionis a voce Principali procedat.

§ IV. Igitur post libros quinquaginta Digestorum, seu Pandectarum, (in quibus omne jus antiquum collectum est, quod per eundem virum excelsum, Tribonianum, necnon ceteros viros illustres et facundissimos confecimus) in quatuor libros easdem Institutiones partiri iussimus, ut sint totius legitimae scientiae prima elementa.

§ V. In quibus breviter expositum est, et quod antea obtinebat, et quod postea desuetudine inumbratum Imperiali remedio illuminatum est.

§ VI. Quas ex omnibus antiquorum Institutionibus, et praecipue ex commentariis Cui nostri tam Institutionum, quam Rerum Quotidianarum, aliisque multis commentariis compositas, cum tres viri prudentes praedicti nobis obtulerunt, et legimus et recognovimus, et plenissimum nostrarum Constitutionum robur eis accommodavimus.

§ VII. Summa itaque ope et alacri studio has leges nostras accipite, et vosmetipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram Rempublicam in partibus ejus vobis credendis gubernari. D. CP. XI. Kalend. Decemb. D. IVSTINIANO PP. A. III. CONS.

OBSERVATIONS

UPON THE

PROOEMIUM of the INSTITUTES.

¹ More particularly in § 6.

² See C. 1. 17. 2. § penult.

³ C. 1. 17. 2. penult. Add. Inst. Prooem. § ult.

⁴ C. 1. 27. 2. pr. See Alciat. IX. Parerg. 6. Mabillon. de Re Diplom. II. 3.

Montfauc. Palaeograph. Gr. p. 174.

⁵ Arg. D. 50. 17. 34. and 25. 4. 1. 15. Which will be farther confirmed from comparing C. 6. 30. 22. 2.—Nov. 90. pr.

THE Preface or Prooemium of the Institutes is an Imperial Constitution of the Emperor *Justinian*, giving a Sanction¹, to what *Tribonian*, and his two Associates had compiled. So that from the date hereof, viz. XI. Kal. Decemb. which was in the Year of the Christian Aera 533. or, to speak more accurately, from III. Kal. Jan. following², these Institutes were to be received as well for Law in the Courts of Justice, as Elements or first Principles in the Schools and places of Education.

It is therefore by the Greek Paraphrast *Theophilus* called Η Διάταξις ἡ βασιλεῦσα τὰ Ἰνστιτῦτα, and by *Justinian* himself *Leges*.

Leges autem nostras, quae in his Codd. id est, Institutionum seu Elementorum et Digestorum vel Pandectarum posuimus, suum obtinere robur³.

IN NOMINE DOMINI NOSTRI IESV CHRISTI.

This solemn Entrance upon his Legislation, *In the Name of God*, is elsewhere used, as in the II. and III. Confirmation of the Digests, in the Confirmation of the Code, and at the beginning of several Novels.

Thus, to use the Emperor's own Words,

In Nomine Domini nostri Jesu Christi ad omnia consilia, omnesque actus semper progredimur⁴.

A question of Law arises from this, viz. Whether in solemn Acts, such as Deeds, Wills, and all other kind of public Instruments, the form of Words commonly made use of,

IN THE NAME OF GOD. AMEN,

be of legal necessity, so that the Instrument shall be void for want of it?

It is answered in the Negative, at least that necessity is not evinced from this passage. The words here and elsewhere, are not *dispositiva*, but *enunciativa*, as the Lawyers say: *i. e.* make no rule of Law, but are only a Form of Speech, that the Writer chose to make use of.

It is however maintained, that this is to be understood with Restriction, viz. Unless the Custom of the Place has made it necessary.

The Emperor *Leo* gives this Solemnity a great weight in the Ratification of Contracts:

Θεωρί-

Θεσπίζομεν ἂν ἐν παντὶ συμφώνῳ, ἐν ᾧ ἂν τὸ ἐκ τῶν θεῶν τέτων συναντι-
λήψεων ἐχέγλυον πρὸς τὴν ἀξιοπιστίαν προσῇ, τὴν ἰσχὺν παρεῖναι
κραταράν τε καὶ ἄλυσον, καὶ μηδεὶς λόγος προσημύσεως [1. προσημύσεως]
συγγέγραπτο*.

A Notion has generally prevailed, that the zeal of the Christian Em-
perors drew this practice from the Precept of the Apostle⁷. I should ra-
ther take it as a remain of the old Roman Custom, the style of that Coun-
try and People, who seldom wrote, or entered upon business of Import-
ance, *sine Consilio Deorum, aut Ope invocata*.

*In ea Civitate, quae omnibus rebus incipiendis gerendisque Deos ad-
hibet⁸.*

*Quae deprecatus sum a Diis Immortalibus, Judices more institutoque
Majorum, illo die, quo auspicato Comitibus Centuriatis, L. Murenam
Cos. renunciavi⁹.*

*Bene ac sapienter, P. C. Majores instituerunt ut rerum agendarum,
ita dicendi initium, a precationibus capere, quod nihil rite nihilque
providenter Homines sine Deorum immortalium ope, consilio, honore
auspicarentur¹.*

Ἔθος ἐστὶ τοῖς Ἀρχαῖοις, εἰς τὴν Βουλὴν εἰσιῖσιν οἰωνίζεσθαι².

So the Greeks always opened their Councils with a Sacrifice³. Thus the
*Argives*⁴. But with the Poets in particular this Custom was very prevalent:

*Proinde, jure Vatum, invocatis Diis, et inter Deos, ipso, cujus res,
opera, consilia dicturus es, immitte rudentes, pande vela, ac, siquan-
do alias, toto ingenio vehere⁵.*

*Cum bonis potius ominibus, votisque ac precationibus Deorum Dearum-
que, si, ut Poetis, nobis quoque mos esset⁶ —*

Thus we come by

Εκ Διὸς ἀρχώμεσθα.	<i>Theocritus,</i>
	<i>Aratus.</i>
Εν σοὶ μὲν λήξω, σέο δ' ἀρξομαι.	<i>Homer.</i>
Ἀρχόμεν σέο, Φοῖβε.	<i>Apollon. Rhod.</i>
Ab Jove principium, Musae.	<i>Virgil⁷.</i>

And from this solemn and religious practice at the entrance upon public
business, the term *Auspicari* has gained the notion of *Beginning*, abstract-
edly from its proper and primary signification. So the *Inauguration* of a
Prince, upon the same principles, is used for the beginning of his Reign.

The Imperial Titles here recited have been well explained by many
Writers, as well Commentators upon the *Institutes*, as others, but more
particularly and minutely, by *Gab. Trivori* in his *Observatio Apologeti-
ca*⁸, and *Baron Spanheim* upon Medals⁹.

* Sancimus itaque cuicunque pacto sponso divini numinis auxilio quo firmior subnixus adfuerit,
eam validissimam esse, planeque insolubilem, etsi ne verbum quidem de poena factum fuerit.

⁶ Leon. Nov.
72. pag. 484.
Ed. Scrimger.
Harmoni-
lus I. Prompt.
J.C. 9. quotes
this Passage
from the 38th
Novell.

⁷ Coloss. III.
17.

⁸ Liv.
XXXVIII. 48.

⁹ Cic. pro Mu-
ren. init.

¹ Plin. Paneg.
init.

² Appian. II.
B. Civil. p. m.
501.

³ Sch. Aristoph.
Acharn. § 44.

⁴ Liv. XXXII.
25.

Lieb. Gotha
Nummar.
pag. 106.

Of this So-
lemnity see
more,
Cic. in Vatin.
§ 8, 9.

pro Rabir. § 4.
Divinat. § 13.
Val. Maxim.
Praef.

Servius ad
Virg. VII.
Aen. 153.

⁵ Plin. VIII.
Epist. 4.

⁶ Liv. Praef.
extrem.

⁷ Add. Cic. II.
de Legg. 3.
F. Vrinii

Virgilius cum
Graec. colla-
tus pag. 31.

⁸ Otto. The-
saur. Jur.
Rom. I om. 1.

⁹ Tom. II.
This Dissert. XII.

PROOEMIUM INSTITUTIONVM.

This croud of Titles is confirmed by many Inscriptions, by Medals, as far as could be allowed, and by this passage in *Seneca* :

* Senec. I. de Clement. 14.

Ambitiosae Majestati quicquid potuimus titulorum congestimus *.

IMPERATOR.

This Word has many Senses.

I. The first and simplest is that of General, or chief Commander of an Army.

† Cic. I. de Orat. 48.

Imperator est Administrator belli gerendi †.

II. Imperator in a more emphatical signification, is a Commander, who upon a signal and important service, had the Title IMPERATOR confer'd upon him by the acclamations of the foldiers, or a decree of the Senate. This, both during the Republic :

‡ Cic. V. ad Attic. 20.

Castella munitissima, nocturno Pomptinii adventu, nostro matutino, cepimus, incendimus: Imperatores appellati sumus ‡.

And after,

§ Tacit. III. Annal. 74. Add. Cic. XIV Philip. 4. et 5. Plin. Paneg. § 12. et 56.

Tiberius id quoque Blaeso tribuit, ut Imperator a legionibus salutaretur, prisco erga duces honore, qui bene gesta Rep. gaudio et impetu victoris exercitus conclamabantur §.

¶ Dion Cassius XXXVII. 40. § B. Civ. 11. p. m. 455.

Thus the Name of *Imperator* from an Office, became a Title of Dignity. And the number of the Enemy, that fell in the engagement, was ascertained: below or under which this Title was not regularly applied,

Ο δ' ἐν Ἀντώνιος ΑΥΤΟΚΡΑΤΩΡ ἐπὶ τῇ νίκῃ, καίτοι τῷ ἀριθμῷ τῶν πεφονευμένων ἐλάττονος ΠΑΡΑ ΤΟ ΝΕΝΟΜΙΣΜΕΝΟΝ ὄντος, ἐπεκλήθη*.

From *Appian* we learn †, if *Appian* may be credited, that the number must be Ten Thousand.

We are taught by *Dion Cassius*, that this Title was confer'd but once in one War. *Claudius*, says he, in his War against *Britain*,

† Dion Cassius LX. 21.

‡ See Spanheim. Dissert. X. Tom. II. pag. 180. seq.

§ Dion Cassius XLIII. 44. et Not. ad loc.

Id. LII. 41. Zonaras X. 32.

ΑΥΤΟΚΡΑΤΩΡ ΠΟΛΛΑΚΙΣ ἐπωνομάσθη ΠΑΡΑ ΤΑ ΠΑΤΡΙΑ. Οὐ γὰρ ἐστὶν ἐν ἑδρῇ πλεον ἢ ἅπαζ ἐκ τῶ αὐτῷ πολέμῳ τὴν ἐπικλήσιν ταύτην λαβεῖν †.

This Title was commonly expressed in their Coins, both under the Republic and after ‡.

III. *Imperator*, under *Julius Caesar*, took a third signification, and implied the sovereign civil Authority, or what we understand by *Emperor* §.

Let it be remembered, that *Imperator* in this Sense stands first: in the first and second it stands last.

* *Antonius hujus victoriae causa IMPERATOR, quanquam caesorum numerus constituto minor esset, appellatus est.*

† *ALIQVOTIES IMPERATOR dictus est, contra institutum Romanorum. Neque enim saepius, quam semel, licet uno de bello id nomen assumere.*

PROOEMIUM INSTITUTIONVM.

31

So we say *Imperator Caesar Augustus*, but on the other hand, we should write, *M. Tullius Imp.* as is plain from the Address of many of his Letters.

*Recepit Julius prænomen Imperatoris, cognomen Patris Patriæ*⁴.

⁴ Sueton. in Jul. § 76.

It is so constantly in Inscriptions:

IMP. CAESAR. DIVI. FILIVS. etc.

Be it also remembered that the second Sense was not lost or destroyed by the third. Thus many Emperors [*Imperatores*] were saluted *Imperatores* long after their Accession. *Octavian*, for instance, had that compliment paid him upwards of twenty times.

⁵ Tacit. I. Annal. 9. Add. Spanheim. l. c. Campianus de Magistrat.

Numerus etiam Consulatum celebrabatur, quo Valerium Corvum et

Rom. pag. 10.

C. Marium simul aequaverat (Sc. Corvus VI. and Marius VII.):

Dion Cassius

Continuata per septem et triginta annos Tribunitia Potestas: Nomen

XLIII. 44.

*Imperatoris semel atque vices partum*⁵.

⁶ Gruter.

Most of this appears confirmed from Monuments of that Emperor.

CXL. 2.

⁷ L. Theod.

Gronov. ad

Marm. Bas.

Coloss. in ho-

nor. Tiberij.

Cap. 9.

Casaub. ad

Sueton. Jul.

§ 76.

Alex. ab Alex.

I. 2.

Buleng. Imp.

Rom. I. 1.

Loon de Ma-

num. Serv. l. 6.

Gravin. de Im-

per. Romano.

Sigon. de Jure

Provinc. II. 7.

—Fast. p. 304.

Valtrin de Re

Militari VII.

I.

Thef. Ant.

Rom. T. IV.

p. 1864.

Briffon. de

Formul. IV.

p. 351.

⁸ Tacit. III.

H. l. 86.

Spanheim. T.

II. p. 354.

⁹ Pagi Crit. ad

Baron. ad an.

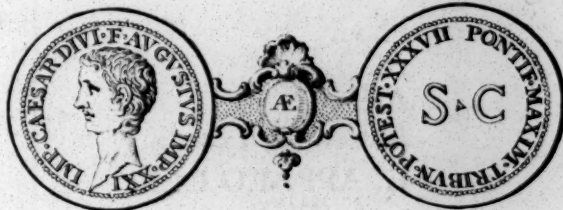
69. et 97.

¹ Gruter. In-

script. CLI. 5.

Spanheim. T.

In II. p. 357.



And accordingly an Inscription at Rimini erroneously copied by *Apian*, and others, has been thus restored,

IMP. CAESAR. DIVI. F. AVG. PONT. MAX. COS.

XIII. IMP. XXI. TRIBVNIC. POTES. XXXVII. P. P.⁶

Concerning the title *Imperator*, may be consulted the Authors quoted in the margin⁷.

CAESAR

Was a Cognomen in the *Gens Julia*, which was assumed by the successors of *Julius*.

In process of time, viz. after *Nero*, it was the practice to give this Name to the Sons of the Emperors. So *Domitian*⁸. *Trajan*⁹. Afterwards those who were *destinati Imperio* began to be called NOBILISSIMI CAESARES¹. Upon the removal of the Empire from Rome to Byzantium, *Caesar* again became the Name of the Emperors.

And in the ninth Century, the Title of *Caesar* was transfer'd by Pope *Leo* to the Emperors of Germany, who still enjoy it.

And by a Constitution of *Gregory V.* P. M. and *Otto III.* Imp. the German Princes, now called Electors, were empowered to nominate a Successor, or Heir Apparent, whose Title is *King of the Romans*.

PROOEMIUM INSTITUTIONVM.

In like manner

Prince of Wales ————— England.

Dauphin ————— France.

Prince of Asturias ————— Spain.

Prince of the Braxilles ————— Portugal.

And Anciently,

Prince of Finland ————— Sweden.

Prince of Norway ————— Denmark.

F L A V I V S.

³ In Vespas.
init.

This Title was used by a long series of Emperors from *Vespasian*, who sprung from the *Flavian* Family, an obscure and ignoble one, according to *Suetonius* ³, *obscura ac sine ullis Majorum imaginibus*.

For almost every new Family among the Emperors contributed a new Title.

Thus, as the Emperors upon their decease became deify'd, we find a succession of Priests for every distinct Race or Family: as,

Sacerdotes

Flavii

Adrianales

Aeliani

Antoniniani, &c. ⁴.

I. APPAEO L. F.

PVP.

PVDENTI P. P.

TRIB. COH. XII.

VRB. ET X. PRAET.

FLAMINI FLAV.

PATRO ⁵.

⁴ Alex. ab Alex. I. 26.
Pratilli upon
the Via Appia, p. 67.72.

⁵ See Meurf.
Exercit. Crit.
Part. II. Cap.
8.

Upon this occasion it may not be improper to observe, how the Compliment paid by *Martial* to one of this Family, became almost a Prophecy:

Manebit altum Flaviae decus Gentis

Cum Sole et Astris, cumque Luce Romana ⁶.

⁶ Martial. 9.
Epigr. II. 8.

It must not be forgot, that this title of *Flavius* had been dropt for some time, and resumed by the fourth Predecessor of *Justinian*.

Nor must it be forgot, what havock the old Glosses of the Institutes make in expounding *Flavius* &c. and such passages, for want of the light of Classfical Learning.

A L A M A N I C V S, &c.

The Titles which follow, were taken, *more Romanorum*, from the Nations he had subdued, or from those he had some pretensions to.

*Sub quo Vandalici ceciderunt strage Tyranni,
Edomitique Getae, pubes Alamannica, Franci* ⁷.

⁷ Corippus de
Justiniano.

This

This was done in imitation of the old Romans, Scipio *Africanus*; Metellus *Numidicus*, *Creticus*; Servilius *Isauricus* &c.

CRETA dedit magnum, majus dedit AFRICA nomen,

Scipio quod victor, quodque Metellus habet.

Nobilius domito tribuit GERMANIA Rhenus:

Et Puer hoc dignus nomine, Caesar, eras⁷.

⁷ Martia! 2.
Epigr. II. 1.

AFRICA victorem de se vocat, alter ISAVRAS,

Aut CRETVM domitas testificatur opes:

Hunc NVMIDAE faciunt, illum MESSANA superbum:

Ille NVMANTINA traxit ab urbe notam⁸.

⁸ Ovid. I.
Fast. 593.

Si ejus Saeculo mos ille vixisset (or vixisset rather), quo Romani Duces Macedonici, Cretici, Numantini de vocabulis Gentium subactarum adoptivum insigne sumebant⁹.

⁹ Lat. Pacat.
Drepan. Panegy. Theodof.
c. 5.

I cannot here omit that high-strained Compliment, which was paid to Germanicus:

Si petat a victis, tot sumat nomina Caesar,
Quot numero gentes maximus orbis habet¹.

¹ Ovid. I.
Fast. 599.

We must not pass over the famous Circumstance in the Life of Caracalla, who had killed his Brother Geta.

Non abs re est etiam diasyrcticum quiddam in eum dictum addere. Nam quum Germanici, et Parthici, et Arabici, et Alemannici nomen ascriberet (nam Alemannorum gentem devicerat) Helvius Pertinax — dicitur joco dixisse: Adde, si placet, etiam GETICVS MAXIMVS, quod Getam occiderat fratrem, et Gotti Getae dicerentur².

² Spartian. in
Caracalla
c. 10.

FRANCICVS.

Not the same with *Gallicus*. The Franci were a People of Germany, beyond the Rhine, who afterwards invaded the Roman Province of Gaul, and founded there that great Empire, which is now called after them. But this happened some time after our Period.

Multa ille [Constantinus] Francorum millia qui Bataviam, aliasque cis Rhenum terras invaserant, interfecit, depulit, cepit, abduxit³.

³ Panegy. Maximian. et Constant.
c. 4.

So it is said of Aurelian:

Idem apud Maguntiacum, Tribunus Legionis sextae Gallicanae, Francos, irruentes, quum vagarentur per totam Galliam, sic adflixit⁴ —

⁴ Vopisc. in Aureliano

The Title *Francicus* was first given to Probus by the Acclamation of the People, according to *Vopiscus*⁵. They inhabited that Tract of Land that lyes between the Rhine and the Weiser.

c. 7.

⁵ in Probo
c. 11.

GERMANICVS.

Here again we must distinguish between the Germans, and Almans, as is evident from both Titles being attributed to our Emperor here, as to many others also.

*Testes sunt Marmaridae in Africae solo victi, testes Franci in viis strati paludibus, testes Germani et Alemanni, longe a Rheni summoti littoribus*⁵.

⁵ Vopisc. in Probo c. 12.

*Denique ut omnis Alemannia, omnisque Germania cum caeteris quae adjacent gentibus, Romanum Pop. ferratam putent gentem, ut specialiter in nobis ferrum timeant*⁶.

⁶ Trebell. Poll. in XXX. Tyr. de Mario.

PIVS.

This Title was first invented for Tiberius, the Heir of Augustus: but did not take place.

*Cum PII Cognomen delatum esset Tiberio, post debellatum ab eo Illyricum Augustus intercessit*⁷.

⁷ Sueton. in Tiber. 17.
⁸ Spartian. in Hadrian. c. 24.

Capitolin. in Antonino Pio. c. 2.

Xiphilin. ex Dione l. 70.
Eutrop. VIII.

⁴ Spanheim. T. II. pag. 434.

⁹ Nov. 78. c. 5.

¹ Lamprid. in vita. c. 8.

² Plin. VII. H. N. 43.

Senec. l. de Clement 14.

Dion Cass. LVI. 38.

³ Spanheim. Tom. II. pag. 72.

⁴ Sallust. B. Jugurth. § 100.

⁵ Patere. II. 27.

⁶ Plin. VII. H. N. 44.

⁷ Tertullian. Apolog. c. 11.

⁸ Sueton. Ti. l. 59.

Pius, Felix, &c. were antiently used with the Romans for Sur-names or Agnomina, as *Metellus* for his filial Duty got the addition of PIVS (and *Aeneas* before him), *Sylla* from his Successes, FELIX. When the Emperors first took them up, they were personal Compliments, but passing over to their Successors, they became, in process of time, as it were incommunicable, and so many expressions of Majesty.

It was first assumed by *Antoninus*, the Successor of *Hadrian*⁸:

Αντωνίνος ὁ τῆς Εὐσεβείας ἐπώνυμος, ἐξ ἑπερ καὶ εἰς ΗΜΑΣ τὰ τῆς προσηγορίας ταύτης καθήκει⁹.

FELIX.

This Title is said to be first made use of by *Commodus*¹. But according to others, it was prior to his Time². And it is not improbable, the original of it was owing to *Sylla*, the Dictator³, of whom it is said,

*Multi dubitavere, Fortior an Felicior esset*⁴

*De quo Juvene [Mario sc. C. Marii F.] quid existimaverit Sulla in promptu est. Occiso enim demum eo, Felicis nomen assumpsit*⁵.

*Vnus sibi ab hoc aevi Felicis cognomen assuerit L. Sylla. Civili nempe sanguine, et patriae oppugnatione adoptatus, et quibusdam Felicitatis inductus argumentis, quod proscribere tot millia ac trucidare potuisset. O prava interpretatio, et futuro tempore infelix*⁶.

*Quis ex illis Diis vestris gravior et sapientior Catone, justior et militatior Scipione, quis sublimior Pompeio, Felicior Scylla, copiosior Crasso, eloquentior Tulio*⁷.

*Adspice Felicem Sibi, non Tibi, Romule, Sullam*⁸.

PROOEMIUM INSTITVTIONVM.

35

Turpem Adolescentulum, et Virum fortem dicerem, nisi ipse se Felicem appellari maluisset ⁸.

⁸ Valer. Max
VI. 9. 6.
⁹ Solin. c. 7.

Dictus potius, quam fuerit, Felix ⁹.

Sulla Felix, si se parcius vindicasset: sed enim vero multis capitibus Rostra complevit ¹.

¹ Panegyr.
Constant.
Aug. c. 20.
² l. i. p. m. 410.

Appian mentions a gilt Equestrian Statue of *Sylla*, with this Inscription,
CORNEL. SYLLAE. IMPERAT. FORTVNAT.

There is something very extraordinary in the notions of the Roman Emperors upon this Head:

Noli Timere: Caesarem et ejus Fortunam vehis, were the Words of *Julius Caesar*.

Tertia die, quum se gravari videret, M. Antonino Remp. et Filiam, praesentibus Praefectis, commendavit, Fortunamque Auream, quae in Cubiculo Principum poni solebat, transferri ³.

³ Capitolin.
in Antonin.
Pio. c. 12.

Which was therefore called *Fortuna Regia*.

Fortunam deinde Regiam, quae comitari Principes, et in cubiculis poni solebat, geminare statuerat, ut sacratissimum simulacrum utrique relinqueret filiorum. Sed quum videret se perurgeri, sub hora mortis jussisse fertur, ut alternis diebus apud filios Imperatores in cubiculis Fortuna poneretur ⁴.

⁴ Spartian. in
Severo fin.

And in like manner, *Justinian* in his last Sickness ordered that *Justin*, his Successor, should be crowned with the Imperial Diadem, and that the *Signum Faventis Fortunae* should be carried into his Apartments.

INCLYTVS

Is a less frequent Title: to be seen however among the Imperial ones of

<i>Decius Trajanus</i>	<i>Gruter Inscr.</i>	CCLXXIII.	5.
<i>Constantius</i>	_____	CCLXXXI.	1.
<i>Valentinian</i>	_____	CCLXXXV.	6.
<i>Valens</i>	_____	CCLXXXVI.	1.

VICTOR et TRIVMPHATOR.

These Titles prevailed about the time of *Constantine M.* and were continued by their Successors, as appears from Inscriptions.

Constantinus, Constans and *Constantius* were the First, whose Medals bear

VICTORES. OMNIVM. GENTIVM.
ET. TRIVMPHATORES. GENTIVM.
BARBARARVM ⁵.

⁵ Dodwell.
Differt. Cy-
prian. p. 245.
Cuper Mo-
num. Antiq.
p. 248.
Otto ad Pro-
oem. Instit.
Liebe Gotha
Nummar.

Sic pag. 371.

PROOEMIUM INSTITUTIONVM.

Sic Victor ac Triumphator Justinianus Imperator, et Consul Belisarius Vandalici, Africani, Geticique dicentur ⁶.

⁶ Jordan. de
Reb. Getic.
juxta fin.

The Emperor *Justinian* was often in the Camp saluted **CALLINICVS**, by the Acclamation of the Army.

The Title *Triumphator*, was only given *pro aucto Imperio, non pro recuperato*. And this *more Romano*. So *Q. Fulvius* and *L. Opimius*, because

⁷ Valer. Max. they *recovered* Capua and Fragellæ only, were denied a Triumph ⁷.
II. 8. 4.

AUGVSTVS.

This Name was first given to *Octavian*, A.V.C. 727. upon a particular occasion, which see in *Dion Cassius* quoted below.

Traſtatum in Senatu, an quia condidiſſet imperium, Romulus vocaretur: ſed ſanctius et reverentius viſum eſt nomen Auguſti, ut ſcil. jam tum, dum colit terras, ipſo nomine et titulo conſecraretur ⁸.

⁸ Flor. IV. 12.

C. Caſaris, et deinde Auguſti cognomen aſſumpſit, alterum teſtamento majoris avunculi, alterum Munatii Planci ſententia, cum, quibuſdam cenſentibus, Romulum appellari oportere, quaſi et ipſum conditorem urbis, praevaluit Munatii Planci ſententia, ut Auguſtus potius vocaretur, non tantum novo ſed etiam ampliore cognomine, quod loca quoque religioſa, et in quibus auguratio quid conſecratur, Auguſta dicantur ab auctu, vel ab avium geſtu guſtuque: ſicut etiam Ennius docet, ſcribens

Auguſto augurio poſtquam incluta condita Roma eſt ⁹.

⁹ Sueton. in
Aug. 7.
Dion Caſſius.
LIII. 16.
Pauſanias III.
p. m. 92.

Appian. de
B. Civ. l. 1.
p. m. 352.
Cenſoria. de
Die Natali.
c. 22.

Ovid. I. Faſt.
590. et 609.

Spanheim. de
uſu Numiſm.
T. II. p. 371.

Laur. Theod.
Gronov. ad

Marm. Baſ.
Coloſſ. Tiber.
c. 7.

Coraf. III.
Miſcell. 22.

¹ Memoir de
Liter. de l'A-
cad. des In-
ſcript. T. XIX.
p. 432. ſeq.

² Nov. 17. in
init.

³ Sidon. I.
Epiſt. 5.

Though *Suetonius* diſſembles the Fact, it is plain from *Dion* that he affected rather the Title of *Romulus*, but was afraid of the Jealouſy of the People, and the Trouble it might coſt him.

This Title at firſt was only *perſonal*, and did not convey any Idea of Sovereignty. For it is the name, by which we frequently particularize the Succeſſor of *Julius*. This Obſervation has been lately well ſupported by a French Writer; who likewiſe has taken upon him to enquire, by what Steps, and at what Period, the Title of *Auguſtus* came to expreſs the Imperial Power ¹.

For *Auguſtus* was a Name, that ſeveral of the Imperial Family took, who were never Emperors: as *Germanicus*. The Female Line, who had not the leaſt Shadow of Sovereignty with the Romans, had it, as *Antonia Major*. And thus *Livia*, firſt took the Name of *Auguſta*, when ſhe was adopted by her Huſband's Will into the *Julian* Family.

After the time of *Diocleſian*, it was changed into *Semper-Auguſtus*: which Title the Emperor of Germany now enjoys.

ΑΕΙ-ΣΕΒΑΣΟΣ ².

Perennis Auguſtus ³.

Semper-

Semper-Augustus like *Semper-Florentis Homeri*⁴.

So *Tibur semper-udum* in *Horace*. *Semper-Amicitia*. *Propertius*. To this may be refer'd *Semper-lenitas* of *Terence*⁵. And this Passage of *Nepos*⁶.

Quibus rebus fiebat, ut—eorum voluntate perpetuo-imperium obtineret.

So *Inque dies magis in montem succedere Sylvas
Cogebant, infraque-locum, concedere cultis*⁷.

pr. IMPERATORIAM MAIESTATEM.

Majestas was applied indifferently to that Person, or part of the People, where the Supreme Authority rested. During the Republic it was with the People, *Majestas Populi Romani*.

*Majestas est Magnitudo quaedam P. R. in ejus potestate ac Jure retinendo*⁸.

*Si Majestas est Amplitudo ac Dignitas Civitatis, is eam minuit, qui exercitum hostibus P. R. tradit*⁹.

Or to whom they delegated their Authority and Jurisdiction, *Id qui vicem Reip. sustinebant*.

Thus Praetors, Judges, and all those, who had any share in the public Administration, are said to have *Majestatem*¹.

Thus the Parental Authority, which was armed with an absolute Power of Life and Death, is by some of their Writers called *Majestas Patria*².

*Pliny*³ has *Majestas Pueritiae*, *Livy*⁴ *Majestas Matronarum* in a somewhat different sense.

The People by the *Lex Regia*, transfer'd all their Power upon the Emperor. Whence *Majestas Augusti*.
*Majestas Tiberii*⁵.

Imperatoria Majestas was introduced by *Gallienus*, and continued ever after⁶.

§ 3. MAGISTRO PALATII.

The *Magister Palatii* or *Officiorum*, as he is sometimes called⁷, is an Office, not unlike our Lord Chamberlain⁸.

The Officers at Court in the lower Ages were generally called *Magistri*, as

Magistri Scriniorum
—— *Libellorum*
—— *Officiorum*

Gutherius de Officiis Domus Augustae, and *Campianus de Magistratibus Romanis*, are very useful Books to be consulted upon such Occasions, as these. And it may not be improper to observe, that the great Officers under the Republic, and in the higher Empire are described in several Titles of the first Book of the *Digests*: and those of the lower, in the first Book of the *Code*—and the last.

⁴ Lucret. I. 125.

⁵ Ter. Andr. I. 2. 4.

⁶ Miltiad. § 2.

⁷ Lucret. V. 1369. See Schott. Nod. Ciceron. I.

16, 17. Pitisc. Lexic. Antiq. Rom. v. AVGVSTVS.

⁸ Cic. Partit. § 30.

⁹ Id. II. de Orat. § 39.

¹ D. 2. 1. 9.

D. 1. 1. 11. fin.

C. 9. 8. 7. pr. D. 47. 10. 33.

² Valer. Max.

VII. 7. 5.

³ IX. 60.

⁴ XXXIV. 2.

⁵ Tacit. I.

Annal.

⁶ Trebellius Pollio in Gallieno. c. 14.

Salmaf. adloc.

⁷ C. 1. 17. 2.

pr.

⁸ Guther. de

Offic. Dom.

August II. 20.

Cuspinian. in

v. Aurel. Cas-

fiodori.

Cujac. Para-

tit. ad C. de

Offic. Magistr.

Offic.

— ad C. 12.

5. 3.

§ 3. EXQVAESTORE.

The Quaestor was an Officer, which in process of time came to resemble, in some respects, our Lord Chancellor, as he was *Os Imperatoris, Armarium legum, &c.* Of him we shall speak in a more suitable place.

The Words, *Exquaestore, Exconsule, &c.* are what they call undeclinable. We never say, *Exquaestor, Exquaestoris, Exconsuli, &c.* however the Construction may seem to require it⁹.

⁹ See Cest.
ex Muret. ad
§ 3. Prooem.
Instit.

They signifye one who had served the Office of Quaestor, Consul &c. who in the better Ages were called *Viri Quaestorii, Consulares, Praetorii &c.*

§ 3. ANTECESSORIBVS.

Antecessor was distinct from the *Jurisperitus* or *Jurisprudens Forensis*. This exercised the Law in the Courts of Justice: the other taught the Theory of it in the Schools¹.

¹ Cujac. XII.
Observ. 40.
Trivor. Ob-
serv. Apolog.
XXXII. 4.

The Emperor in the Confirmation of the Digests, and elsewhere, calls them

Legitimae Scientiae Professores, Doctores, Interpretes et Εξηγηταί.

² VIII. Ad-
vers. 19.
³ III. Dis-
punct. 12.

Antecessor is not denominated from any Rank or Precedence, as *Turbus* imagined². Nor *ab Auctoritate* Censoria, which is the idle mistake of *Alciat*³, being betrayed into it, by the barbarous Greek Translation of this Word, *Ανιέντωρ*.

The term *Antecessor* is borrowed from the Roman Militia:

Per Speculatores et Antecessores nunciatur⁴.

⁴ Hirtius de
B. Afric.
c. 12.

Irruperant jam agminis Antecessores⁵.

⁵ Sueton. in
Vitell. 17.

It was natural for a People, whose sword was their profession, to draw all their metaphors from the field. Of which the following passage is a very strong instance:

Advocati, qui dirimunt ambigua Fata causarum, suaeque defensionis viribus in rebus saepe publicis ac privatis lapsa erigunt, fatigata reparant, non minus provident humano generi, quam si praeliis atque vulneribus patriam parentesque salvarent. Nec enim solos nostro Imperio militare credimus illos, qui gladiis, clypeis et thoracibus nituntur, sed etiam Advocatos. Militant namque Causarum Patroni qui gloriosae vocis confisi munimine, laborantium spem, vitam et posteros defendunt⁶.

⁶ C. 2. 7. 14.

Thus their military Privileges were extended to the Gown, by the fiction of *Togata Militia*: and that was called *Peculium quasi Castrense, quod ad exemplum Peculii Castrensis filius fam. occasione Togatae Militiae ex Salaris acquisivit⁷.*

⁷ C. 1. 51. 7.
— 2. 7. 4.
— 12. 31.
varic.

§ 3. POST QVADRIENNIVM.

The old Method of studying the Civil Law is here described. Four years were employed before they arrived at the Imperial constitutions.

I. The first year was taken up in reading the Institutes, and the *τὰ πρῶτα*, i. e. the four first books of the Digests. These were called *Dupondii*¹, or *Justinianei Novi*.

¹ Politian. Miscell. c. 2.

II. *Edictales*, ab *Edicto*, which is much illustrated in this Division, viz. the second and third part of the Digests (of which parts or distribution we have spoke above, pag. 21.) Libb. V.—XIX.

III. *Papinianistae*: from *Papinian*, whose writings abound here, viz. in the fourth part of the Digests, Libb. XX.—XXVII. which is the common reason assigned, but, I think, not the true one².

² See Joseph. Neri. II. Analecl. 29.

IV. *Lytae*: from being suposed now capable of *solving* any difficulty in Law. This year finished the remainder of the Digests.

V. *Prolytae*: this year, they advanced to the *Code*.

All this is to be seen more at large in the *Constitution, Omnem*, before the Digests³.

³ Add. Scopp. Collect. II. ult.

The *Quinquennale Studium Juris* has obtained in all ages⁴. And with us I find one *White* of *Basingstocke* (a son of the famous Civilian of that name) about the reign of Queen *Mary*, intitling himself *Magister Artium, et Lyta Juris*.

⁴ See Pet. Muller. de Quinquen. Studio Juris. § 1. c. 4.

The Compilers of our University Statutes seem to have had an eye to this distribution:

*Annum integrum Institutionum lectioni domi suae impendat. Deinde Quinquennium totum publicum Juris Praelectorem audiat*⁵.

⁵ Stat. Univers. Cantab.

L A W

A N D

R I G H T.

Instit. Lib. I. Tit. 1.

Dig. Lib. I. Tit. 1.

Grotius, B. I. Ch. I.

Pufendorf, B. I. Ch. VI.

¹ D. I. 1. 11.
Idlinga Var.
Jur. Civ.
Cap. 5.

² Muelen. ad
Grot. de J. B.
et P. I. 1. 3.

IVS is an aequivocal Word, and stands for many Senses ' according to its different use and acceptation. Some Lawyers reckon up near forty ². From whence it follows that the Emperor and his Lawyers, who begin their Works with Definition, would have done better, if they had proceeded *more philosophico*, and *distinguished* before they had *defined*.

Therefore in this great Ambiguity of Signification, what relief can be expected, must be had from the most simple and natural Distribution; and this is what I am endeavouring.

The consideration of Law or *Jus* is naturally twofold. *Jus* is either *Constituens*, or *Constitutum*, that is, the Word *Jus* is either applicable to that Power, Law or Authority which lays upon us an Obligation, or it is secondly applicable to that Duty, or that Obligation itself. *Jus* is either *Lex quae sancit, prohibet, or cavet*: or it is, *Id, quod Lege sancitum, prohibitum aut cautum est*.

And thus in the Law books, agreeable to this distribution, the four first Titles in the Digests, *viz.*

*De Justitia et Jure,
De Origine Juris,
De Legg. Senatusque Consultis,
De Constitutionibus Principum,*

And the two first Titles in the Institutes, *viz.*

*De Justitia et Jure,
De Jure Nat. Gent. et Civili,*

belong to *Jus* in the first Signification: and, in general, the remainder of the Titles to the other.

The former, Philosophers would call *Jus* in the *Abstract*, the other, *Jus* in the *Concrete*.

To

To instance in a very familiar way of Expression: When we say that *Nature is the common Parent of every thing*: and again, *That such or such a thing does not exist in Rerum Natura*, we mean by this common word *Nature* two very different Apprehensions: by the former, no less than Providence, or that Power which produced all things; and by the other, the present system of Beings so produced and created. The Schoolmen in their barbarous Latinity call one, *Natura Naturans*, and the other, *Natura Naturata*.

To proceed therefore: This *Jus Constitutum* may be considered in two Lights, just as that *Jus* may be applied to *Actions*, or to *Persons*. i. e.

Jus may be said of an *Action*, which we perform or forbear, in conformity to a Law which enforces or forbids it.

Or it may be understood of the Interest of a *Person*, who may be supposed to have a *Right* in such Execution, or such Forbearance.

To instance in the Law of Nature: when I consider,

1. That *Jussum Praeceptum*, or Direction of Nature, or natural Reason, which enjoins Obedience to Parents:

2. That Expression or Behaviour, which shews it:

3. That Right or Demand, which the Parent has to receive it:

All these three with equal Propriety are called *Jura Naturae*.

So that *Jus* is either

1. *Regula*, a Law, Rule, Ordinance, or Direction.

2. An Action conformable to that Direction.

3. A Right, Title, or Property arising from the Virtue of that Obligation.

Of each of these more particularly.

I.

Jus in its first and primitive Sense is *Justitiae Regula*. Or, *Id quod Lex praecipit*.

Quod Naturalis Ratio inter omnes homines constituit—vocatur Jus Gentium *.

* D. 1. 1. 9.

The Definitions of it in this Sense are many,

Legis Praeceptum.

Justitiae Regula.

Norma Legis.

Regula Actuum Moralium, obligans ad id quod rectum est †.

Forma et Regula in Negociis, Commerciis et Contractibus.

Justi Injustique Regula °.

Lex vel Decretum, quo Superior sibi subiectum obligat, ut ad istius praescriptum actiones suas componat †.

† Grot. de J. B. et P. I. 1. 9.

° Senec. IV. de Benefic. 12.

† Pufendorf.

I. de Offic.

Hom. et Civ.

c. 2. § 2.

F

Constitutio

LAW AND RIGHT.

Constitutio jubens pro Imperio quae recta sunt.

Regula humanorum Actuum, et Mensura quae movet ad recte agendum.

Regula omnium Actuum Moralium, qui ab homine proficiuntur, obligans ad id quod rectum, justum ac honestum est: sive quod cum Justitia convenit atque consentit.

Of these Definitions perhaps the shortest is the best, as

Norma Legis.

Praeceptum Legis.

For though it is often understood of the Law itself, it is, to speak more accurately and philosophically, the *Effect* or *Operation* of Law: it is that Bond or Obligation, which a Law properly constituted produces, and differs from it, as an *Effect* differs from its *Cause*. *Lex scil. praecipit. Istud Praeceptum vocatur Jus.*

Inter quos Ratio, inter eosdem etiam recta Ratio communis est. Quae cum sit Lex—inter quos porro est Communio Legis, inter eos Communio Juris est⁸.

⁸ Cic. I. de Legg. 7.

Est enim unum Jus, quo devincta est hominum Societas, et quod Lex constituit una: quae Lex est recta Ratio⁹.

⁹ Id. ibid. 15.

Or it may be considered thus: *Lex* is a precise and determinate *Rule* of Action, tyed down to a particular Fact or Circumstance. Whereas the abstracted Consideration of that Frame, System, Complexion, or Disposition of Duty, which arises from many of those Rules put together is what we mean by *Jus*.

So when we say, *The Civil Law of the Romans*, or, *The Common Law of England*, We have a quite different Apprehension from our Idea of the *Lex Horatia*, *Cincia*, or the *Scutum Velleianum*, in the one case; and a single Statute, or Act of Parliament in the other.

Jus in this first Signification may not improperly be derived a *Jubendo*.

XII. Tabb. } QVODCVNQVE POPVLVS IVSSIT ID IVS ESTO.

So in the very Form of making a Law, or *Populum rogandi*,

Velitis, IVBEATIS, Quirites, &c¹.

De legibus jubendis aut vetandis².

Jura et Jussa Populorum³.

Quod si Populorum jussis, si Principum decretis, si sententiis Judicium IVRA constituerentur⁴.

Qui pernicioſa et injusta populis jussa descripserint⁵.

¹ Instances of which may be seen, Liv. XXII. 10.

Gell. V. 19.

² Cic. I. de Orat. 13.

³ Cic. I. de Legg. 5. fin.

⁴ Id. Ibid. 16.

⁵ Id. II. de Legg. 5.

⁶ Quintilian. I. 7.

For the old Romans, before their Language was perfected, and their Alphabet compleated, used *Jusa*, [i. e. *Jussa*] for what we now write *IVRA*.

⁶ *Paulum Superiores etiam illud quod Nos gemina S dicimus, Jussi, una dixerunt, Jusi.*

Appius

Appius Claudius, a Descendant of *Appius Claudius*, one of the Decemviri, is said to have invented the Letter R.

Appius Claudius—*literam R invenit, ut pro Valesiis Valerii essent, et pro Fufiis, Furii* ⁷.

Fuerunt Patricii minorum Gentium, quorum Princeps L. Papirius Mugillanus, qui Cos. cum L. Sempronio Atriatino fuit — annis post R. conditam CCCXII. Sed tum Papirii dicebami. Post hunc XIII. fuerunt sella Curuli ante L. Papirium Crassum, qui primus Papirius est vocari defitus ⁸.

L. Papirius Crassus was Cos. A. V. C. 414. and one *Appius Claudius*, a little before him, sc. A. V. C. 404 ⁹.

In multis verbis in quibus Antiqui dicebant S. postea dixerunt R. ut in carmine Saliorum sunt haec: COSAVLI, DOLOSI, ESO. Ennio vero ac Pacuvio MISESIA, INCVSIA, MESIDIE, ONESE, RVDESVMQUE, VENESE, quod Venere post, MELIOS melior, FOEDESVM foederum, PLVSIMA plurima, ASENSA arena, IANITOS janitor ¹.

Vt Valesii et Fufii in Valerios Furiosque venerunt, ita Arbos, Labos, Vapos etiam et Clamos ac Lases aetatis fuerunt ².

Aureliam Familiam ex Sabinis oriundam a Sole dictam putant, quod ei publice a P. R. datus sit locus, in quo sacra facerent Soli, qui ex hoc Aufelii dicebantur, ut Valesii, Papirii, pro eo quod est Valesii, Papirii ³.

The Sabines, according to the same Author, used *Ausum* for *Aurum* ⁴.

After all, it is somewhat surprizing, that the Romans should want this almost necessary Sound for so many Centuries, especially as those Alphabets, from which they derived their own, wanted it not. One would have thought that the name of their City [*Roma*] and of their Founders [*Romulus* and *Remus*] might have reconciled them to it sooner.

From the instances produced above, it is not certain, they wanted it absolutely.

Between two Vowels only they placed an S. instead of it. And this I apprehend to be the Truth of the Tradition.

To return. In this Sense of the Word *Jus* we speak, when we say,

*Juris Rationem non pati.
Contra Jus Fasque esse.
Jure esse constitutum.*

And again,

*Dare jura Maritis,
Oppida moliri, leges incidere ligno* ⁵.

Jura neget sibi nata ⁶.

Jura inventa metu injusti fateare necesse est ⁷.

F 2

⁷ D. 1.2.2.36.

Hieron. Mag. IV. Var. Lect. 1.

Gutberleth.

de Saliis.

pagg. 134.

155, 156.

Turneb.

XXIII.

Adverfar. 15.

Funccius de

Puerit. L. L.

C. I. pag. 193.

et C. III. p.

243.

Jos. Nerii I.

Analect. 27.

Muret. ad tit.

D. de Orig.

Jur.

Math. Ae-

gypt. ad

Scutum Mar-

cian.

Paul. apud

Fest. l. 16. init.

Fest. l. 1. v.

Arbosem.

Placidus in

Glossis. v.

Hasenam.

Veliu Lon-

gus de Ortho-

graphia.

⁸ Cic. IX.

Fam. 21.

⁹ Pratilli della

Via Appia.

pag. 17.

¹ Varro de

L. L. l. 6.

² Quintil. I. 4.

³ Festus, pag.

43.

⁴ Id. pag. 44.

⁵ Hor. A. P.

398.

⁶ Ibid. 122.

⁷ Id. 1. Serm.

III. 3.

Tum

LAW AND RIGHT.

*Tum foribus Divae, media testudine templi,
Septa armis, folioque alte subnixa refedit,
Jura dabat, legesque viris⁷,*

⁷ Virg. I.
Aen. 509.

*Quaedam etiam Festis opera exercere diebus
Fas et Jura sinunt⁸.*

⁸ Virg. I.
Georg. 268.

Omnium Legum atque Jurium Fictor, Conditor⁹.

⁹ Plaut. Epid.
III. 4. 86.

And in this sense also we say

Jus Naturae

Jus Civile

Jus Praetorium

Jus Papirianum

Jus Decemvirale, or Jus Duodecim Tabb.

Namely, that Plan or System of Duty, that species of Obligation, which arises from those several Fountains of Law.

¹ Noodt. I. Observ. 18. et, that *CONSVLIUM* or *ADMONITION*¹,
ad D. lib. I. that *PERSVASION*, and such like, come not under the notion of *Jus*.
Tit. 3. pag. 13. For *Jus* implies an Obligation.

Etiam si Ratio non reddatur².

² Senec. XIV.
Epist.

Ο μὲν γὰρ νόμος πέφυκε προλέγειν ἢ μὴ δὲ πράττειν³.

³ Lycurg. c.
Leocrat. § 2.

Οἱ νόμοι — εἰ διδάσκουσιν, ἀλλ' ἐπιτάττουσιν ἢ δὲ ποιεῖν⁴. *

⁴ Id. § 26.

Τὸτο ἐστὶ νόμος, ὃ πάντας προσήκει πείθεσθαι⁵. †

⁵ Demosth. I.
c. Aristogit.
pag. 470.

Whereas on the contrary :

Ο μὲν συμβεβλῶν ἀφίησι τὸν ἀκκόνη κύριον εἶναι τῆς τῶν πραγμάτων αἰρέσεως, ὑπὲρ ὧν ποιεῖται τὴν συμβεβλήν⁶. †

⁶ D. Chrysostom. de
Virgin.

Cujus generis mandatum magis consilium quam mandatum est, et ob id non est obligatorium, quia nemo ex consilio — obligatur⁷.

⁷ I. 3. 27. 6.
D. 17. 1. 2. 6.

To this may be added, that Law must come from a Superior, whereas Counsel or Persuasion may be administered by those who are our Inferiors.

And therefore those expressions of the Philosophers, which seem to countenance the contrary side, must be considered in that figurative Light which indeed belongs to them⁸.

⁸ Noodt. ad
Tit. de R. N.
pag. 482.
col. 2.

Τὸς γὰρ τοῖς πονηροῖς ἡδομένους λυπῶντες οἱ νομοθέται ΠΕΙΘΟΥΣΙ τὰ μὲν φαῦλα μισεῖν, ἡδεσθαι δὲ τοῖς ἀγαθοῖς ἔργοις⁹. ||

⁹ Paraphr. A.
ristot. Nico-
mach. II. 3.

* *Lex solet, quae non sunt agenda, dicere. Leges non docent, sed imperant, quae sunt facienda.*

† *Id est Lex, cui omnes parere necesse est.*

‡ *Qui consilium dat, sinit audientem competentem fieri rei eligendae, vel non eligendae de qua consilium adhibet.*

|| *Eos enim qui malis rebus delectantur Legistatores adhibita molestia persuadent pravas actiones odio habere, delectari autem bonis.*

And

And indeed there are some instances, where the Law too seems rather to recommend than injoin¹.

This Distinction should be well considered, between *Law* and *Counsel*: I mean the different and very opposite Methods of their Administration. Thus *Counsel* operates by the Reasonableness, the Utility of the thing proposed, and *Law* by the Will of the Proposer. On the one hand, I advise without obliging: and on the other, I can oblige without advising. In the former, when the fairness and fitness of the thing recommended is well laid out, it offers to the discreet and ingenuous indeed a kind of *lene tormentum*, which yet by no means makes part of the strict Idea of Obligation; because the Person, to whom it is directed, is still left at his Liberty to apply it or not. In the latter, the legal Necessity, which is produced by the command of a Person invested with proper Authority, derives nothing of its effective Power from the Aptness, the Conveniency, or the Fairness of the Duty enjoined. Not that Law and Reason have nothing to do with one another; but because when I obey, I consider the Obligation only, and not the Merits of it.

And this leads me to reflect a little upon those Maxims of Law, left, us by *Julian* and *Neratius*,

*Non omnium, quae a Majoribus constituta sunt, ratio reddi potest*². ¹ D. 1. 3. 20.

*Et ideo rationes eorum, quae constituuntur, inquiri non oportet: alioquin multa ex his, quae certa sunt, subvertuntur*³.

³ D. 1. 3. 21.

For instance,

*Percunctatum Patris fam. nomen nequis servum mitteret lege sanctum fuisse ait Cato, in ea qua Legem Orchiam dissuadet*⁴.

⁴ Fest. pag.

Upon what reason this Law was founded, was doubtless a secret at the time when *Cato* lived, who seems to mention it for its singularity.³³⁶

But there is a Passage in *Plutarch*, which deserves to be transcribed:

ΟΥΔΕ γὰρ ἐς ἀνθρώποι νόμους τίθενται, τὸ ΕΥΛΟΓΟΝ ἀπλῶς ἔχονσι, καὶ πάντοτε φαινόμενον, ἀλλ' ΕΝΙΑ καὶ δοκεῖ κομιδὴ ΓΕΛΟΙΑ τῶν προσαίματων οἷον ἐν Λακεδαιμόνι κηρύττειν οἱ Εφοροὶ παριόντες εὐθὺς εἰς τὴν ἀρχὴν, μὴ τρέφειν μύσῃ, καὶ πείθεσθαι τοῖς νόμοις, ὡς μὴ χαλεποὶ ὦσιν αὐτοῖς. Ῥωμαῖοι δ' ἐς ἂν εἰς ἐλευθερίαν ἀφαιρῶνται, κέρως αὐτῶν λεπτὸν ἐπιβόλῃ τοῖς σώμασιν. ὅταν δὲ διαθήκας γράψωσιν, ἑτέρας μὲν ἀπολείπεισι κληρονόμους, ἑτέροι δὲ πωλεῖσι τὰς υἱίας, Ο ΔΟΚΕΙ ΠΑΡΑΛΟΓΟΝ ΕΙΝΑΙ. παραλογώτατον δὲ τὸ τῷ Σόλωνος, ἄτιμον εἶναι τὸν ἐν σάσῃ πόλεως μηδετέρας μερίδι προδόμενον, μηδὲ συσασιάσαντα. Ἐ ἄλλης ΠΟΛΛΑΣ ἂν τις ἐξείποι ΝΟΜΩΝ ΑΤΟΠΙΑΣ, μήτε τὸν λόγον ἔχων τῷ νομοθέτῃ, μήτε τὴν αἰτίαν συνιὲς ἐκάστῃ τῶν γραφομένων.*

¹ Dissert.

XXXIII. sc. de

* Etenim et eae Lezes, quae ab hominibus ponuntur, non ubique habent rationem eorum quae praecipuumur illis, immo quaedam videntur omnino ridicula. Vt quod Lacedaemone Ephori statim ab inito magistratu edicunt ne quis mysticem alat, et ut legibus obtemperent, ne eae ipsis sint difficiles observatu. Romani, quos in libertatem vindicant, eorum corporibus stipulam tenuem injiciunt. Et ubi testamentum condunt, alii scribuntur heredes, alii vendunt bona: quod videtur alienum a ratione. Alienissimi mi illud Solonis, qui in seditione neutri se parti adjuvengentem igni minia notavit. Et plane multa legum absurda esse dixerit, qui auctoris mentem et causam scriptorum singulatim non cognoverit.

It was a practice of several ancient Lawgivers, especially such as had a tincture of *Pythagoras'* manner, to cloath their Laws in Symbol and Allegory: νομοθετεῖν αἰνιττομένους, to speak in Riddles, and to affect the Language and Reserve of Oracles.

This administered frequent occasion for the exercise of the Doctrine delivered by the two Lawyers lately cited. For the Practice lasted, when the Allusion might be forgot: The Currency of the Law might not be disputed, though time had in great measure worn down the Image, and damaged the Superscription.

Thus a Constitution of *Solon* at Athens, in regard to a new married Couple, related by *Plutarch* in his life, when considered by itself, seems but ridiculous:

Τὴν Νυμφὴν τῷ Νυμφίῳ συγκαθεύειν συγκατατρά-
γευσαν*.

* Conjug.
Praecept.

But when it comes to be explained by the same *Plutarch*, in another place⁹, viz.

Ο Σόλων ἐκέλευσε τὴν Νυμφὴν τῷ Νυμφίῳ συγκατακλίνεσθαι μήλα Κυδωνί-
νία κατατράγευσαν, ΑΙΝΙΤΤΟΜΕΝΟΣ, ὡς ἔοικεν, ὅτι δεῖ τῷ ἀπὸ
ζόματ⁹ Ἑφωῆς χάριν εὐάρμοσον εἶναι πρῶτην Ἑδεῖαν†,

We take his account as satisfactory.

So again,

¹ Id. ibid.

Οἱ τῇ Γαμηλίᾳ θύοντες Ἡρα, τὴν χολὴν ἐ συγκαθαγίζουσι τοῖς ἄλλοις ἱεροῖς,
ἀλλ' ἐξελόντες ἔρριψαν περὶ τὸν βωμόν, αἰνιττομένους τῷ νομοθέτῃ, τὸ
μηδέποτε δεῖν χολὴν μηδὲ ὄργην γάμῳ παρεῖναι¹. †

* Aelian. III.
H. A. 9.
³ I. Hierogl. 8.

Ἀκέω τὰς πάλαι ἐν τοῖς γάμοις μετὰ τὸν Ὑμέναιον τὴν ΚΟΡΩΝΗΝ
ΚΑΛΕΙΝ, σύνθημα ὁμονοίας τῷτο τοῖς συνῆσιν ἐπὶ τῇ παιδοποιίᾳ δι-
δόντας². ||

I mention this, the rather, because the reflection of *Horus Apollo*³ upon this very custom comes up to my purpose:

Τῆς δὲ τοιαύτης αὐτῶν ὁμονοίας χάριν, μέχρι νῦν οἱ Ἕλληνες ἐν τοῖς γά-
μοις, καλεῖ Κόρη Κορώνην ΛΕΓΟΥΣΙΝ ΑΓΝΟΥΝΤΕΣ §

* Sponsa in thalamum deducta malum Cydonium gustato.

† Solo jussit sponsam cum sponso concubituram prius manducare malum Cydonium, innuens ea re, primam quae ore et voce initur gratiam concinnam debere esse et suavem.

‡ Qui Junoni Pronubae sacrificant, ii fel non cum reliqua conficiunt victima, sed exemptum apud altare abjiciunt. Quo instituto Legis Auctor obscure significavit, conjugio nunquam debere bilem iramque interesse.

|| Audio veteres in nuptiis post Hymenaeum cornicem invocasse, hocque concordiae signum illis, qui liberorum quaerendorum causa convenissent, dedisse.

§ Ob tantam autem cornicum concordiam in hunc usque diem Graeci in Nuptiis verbum illud, Voca Virgo Cornicem, usurpant, NEC TAMEN INTELLIGUNT.

There is not perhaps a more remarkable passage in Antiquity for my point, than the following one in *Athenaeus* ⁴.

⁴ VII. 13.

Φησὶ γὰρ Ἀγαθαρχίδης ἐν ἑκτῇ Εὐρωπαϊκῶν τὰς ὑπερφυεῖς τῶν Κωπαίδων ἐγγέλεων, ἱερείων τρόπον σεφανεύσας ἔκατευχόμενας, ἔλας τε ἐπιβάλλοντας θύειν τοῖς Θεοῖς τὰς Βοιωτὰς, καὶ πρὸς τὸν ξένον τὸν διαπορῶντα τὸ τῷ γένει παραδόξον ἔπυνθανόμενον, ἐν μόνον εἶδέναι φῆσαι τὸν Βοιωτὸν, φάσκων τε ὅτι ΔΕΙ ΤΗΡΕΙΝ ΤΑ ΠΡΟΓΟΝΙΚΑ ΝΟΜΙΜΑ ἔστι ΜΗ ΚΑΘΗΚΕΙ ΤΟΙΣ ἈΛΛΟΙΣ ΤΗΡΕΙΝ Αὐτῶν ΑΠΟΛΟΓΙΖΕΣΘΑΙ. *

The honest Boeotian acted here with more adroitness than could reasonably be expected from one of his character. He would not reveal to strangers a secret of his country. Possibly it was a secret to his country itself.

Of this kind also is that memorable Punishment of Parricides among the Romans, which is known to all readers of antiquity, and is alluded to in the following lines of *Juvenal*.

*Cujus supplicio non debuit una parari
Simia, nec serpens unus, nec culleus unus* ⁵.

⁵ VIII. Sat.
213.

*Et deducendum corio bovis in mare, cum quo
Clauditur adversis innoxia Simia fatis* ⁶.

⁶ XIII. Sat.

And accordingly we often find the language of the Roman lawyers :

Vnde miror quare constare videatur ⁷.

⁷ D. 48.9.9. pr.
D. 11. 7. 9.

Quod quidem perquam durum est, sed ita Lex scripta est ⁸.

⁸ D. 40. 9. 12.
1.

According to that passage in *Lactantius* :

Tanta est Auctoritas Vetustatis, ut inquirere in eam scelus esse ducatur ⁹. ⁹ II. Divin. Instit. 7.

Although the Idea of Obligation be regularly included in our Notions of *Jus* or Law; and Persuasion, as we have just now seen, is upon that very principle ~~not~~ reconcileable to it: yet PERMISSION, which appears to be still farther removed from the idea of Obligation, is held by those who have studied this question best, to be the act of the Law, as much as Precept or Command. Though nothing seems so opposite, as a liberty of acting or not acting on the one hand, and a necessity, I mean a legal one, on the other, yet is *Modestinus* right in his assertion, when he says,

Legis Virtus haec est, Imperare, Vetare, Permittere, Punire ¹.

¹ D. 1. 3. 7.

Si confessum est, haec fere quaeruntur: Utra Lex potentior; ad Deos pertineat, an ad homines: ad remp. an ad privatos: de honore, an

* *Agatharchides libro sexto Europicorum tradit Boeotos anguillas Copaidas, inustatae magnitudinis, hostiarum modo coronare, aspersaque mola cum precibus diis immolare: ac cum peregrinus quispiam, inopinato sacri genere obstupescens cur id fieret, sciscitaretur, ex Boeotis unum nihil aliud potuisse respondere, quam servanda esse majorum instituta, nec decere rationem aliis se consuetudinis patriae reddere.*

de poena: de magnis rebus, an de parvis: Permittat, an vetet, an imperet?

² Quintilian.
VII. 7.

Lex omnis aut tribuit, aut adimit, aut punit, aut jubet, aut vetat, aut permittit.

³ Id. VII. 4.

⁴ Senec. III.
de Benefic. 21.

Quaedam sunt, quae Leges nec vetant, nec jubent facere.

For though *Obligation* be a new Production, and an act exerted by the Lawgiver, whereas *Permission* seems to leave us where it found us, and nothing therefore done by the Legislator all: yet it must be considered, that those things which he permits, and in which he seems to be silent, were equally subject to his disposition, as those which he has now enjoined, or now prohibited. Here therefore is a real positive act of the Legislator, but less attended to, and therefore apt to be disputed. He could have made it your Duty, he now makes it your Option. He acts as much in the one case, as in the other: and both Acts make part of one system. And it is impossible that it should be otherwise. If a person with proper authority strikes out a line, describing where I may not go; at the same time he tells me that the other side of the line is, where I may. That he has inclosed so much from me, is certainly his act (that is allowed on both hands) and it is no less his, that he has inclosed no more. For indeed the act is one and same.

⁵ Inst. Lib. I.
Tit. X.

When the Emperor *Justinian* marks out the prohibited Degrees⁵, he does, *eadem opera*, mark out the unprohibited also.

He tells me, I cannot marry my father's sister, but leaves me at liberty about my father's sister's daughter. The Emperor neither enjoins nor prohibits this; but he informs me of the Law that I do, *jure agere*, whether I do it, or let it alone.

When the Emperor *Theodosius* inclosed this marriage of Cousin Germans within his Pale of Prohibitions, he did no more in his Legislative Capacity, than *Justinian* did, who shut it out.

The *Voconian* Law, which restrained inheritances left to daughters, extended to those only, who were registered in the Cenfor's books. Upon which account, Those who were of Fortunes too low to be registered, and Those who acquired Estates after one *Censura*, but dyed before the next, were *permitted* to make their Daughters their Heirs. The Law did something positive here, when it stopt at this distinction, and extended to the *Cenfi* only, when it might have extended to the *Non-Cenfi* also.

Thus the Law of this Country *fixes* the idea of *Bona Notabilia* at five Pounds. Who can dispute this being an *Act* of the Law? A greater or a less sum might have been equally convenient. And yet by this fixing, the Fortunes of such who die Intestate below this sum, are *permitted* to pass without Administration,

When Romulus *permitted*, not constrained, the Father to sell his children: When the X. Viri *permitted* the Creditors to avail themselves of the person

person of the insolvent debtor, are not these as much, as fairly, and as properly the Acts of a Law-giver, as any that can be produced.

If any besides a Father should sell a free-born child, or any other than a Creditor should take that liberty with the Debtor, the same Laws had provided a proper punishment. What does the Law here but remit that forfeiture? and to *Remit* is equal in Act and Power to *Inflicting*.

Moreover, that Permission is a part of Legislation, is plain from hence; because the Law which permits me to do this or that, lays a restraint upon every body besides from interrupting me in that Right, so permitted or indulged to me.

A *Paterfam.* with the Romans was allowed or permitted to dispose of his Effects by Will, if he pleased. This was a Grant or Act of the Law, whether he made use of it or not. And it is also apparent, that the Law considered this Grant as its own Act, because it would give him a Relief against any that should molest him in this Indulgence, if he thought proper to make use of it: though it was very indifferent to the Law, or the Law-maker, whether he made use of it or not¹.

¹ See Grotius
de J. B. et P.
I. 1. 9.
Muelen. ad
loc.
Pufendorf. I.
6. 15.

II.

Jus in the second Sense is the Attribute of an Action, conformable to that Law or Direction we have been speaking of in the first Sense.

Jus now is called *id quod Justum est*, or, *Regulae praedictae conforme et consentaneum*.

*Jus quia Justum est*².

² Idior.

So the Right of War [*Jus Belli*] is that which may be done *without Injustice*, in regard to a neighbouring State at War.

So *Livy*,

*Sunt et belli, sicut et pacis, jura*³.

³ V. 27.

And *Injustum* is what is repugnant to the Nature, Constitution and Rules of that Society, under which we act.

And in this Language, we make use of the words,

Jus fasque, when we do a thing in conformity to a given Rule:

And

Nefas or *Injustum*, when we do it not.

*Id vero accendit animos, ut per omne Fas ac Nefas secuturi vindicem libertatis viderentur*⁴.

⁴ Liv. VI. 14.

And agreeable to this is the exact Idea of the Term *Injuria*, viz. An Act done contrary to the Rule of Justice, which Rule is *Jus* in its primary Signification.

And accordingly we see them in contradistinction,

*Vos — P. C. quibus pro magnitudine Imperii Jus et Injurias omnes curae esse decet*⁵.

⁵ Sallust. B.
Jugurth. § 16.

LAW AND RIGHT.

Agreeable to this Sense is to be understood that Passage in the beginning of *Lucan's Pharsalia*,

*Bella per Emathios plusquam civilia campos,
Jusque datum sceleri.*

The meaning of *Lucan* is, that in the confusion of a Civil War the ideas of *Right* and *Wrong* had lost their distinction.

⁷ Epist. XVIII.
init.

So *Seneca*⁷,

December est Mensis, cum maxime Civitas defudat. Jus luxuriae publice datum est.

⁸ ad Donat.
pag. 5.

According to that of *S. Cyprian*⁸.

Homicidium cum admittunt singuli, crimen est; Virtus vocatur, cum publice geritur.

This is that *Jus*, which the Greeks express by τὸ Δίκαιον. Though *Aristotle* and the Greek Philosophers rather confine ΔΙΚΑΙΟΝ to Just and Right in Idea; to that which is Just, Right and Lawful in its own nature and in speculation, or what would be so when produced into Action. And when it is so produced, it is called ΔΙΚΑΙΩΜΑ or ΔΙΚΑΙΟΠΡΑΓΜΑ.

According to these considerations, and what has been said above of *Permission*, it appears, that what a Man does in breach of no Law, I mean when he not only acts agreeable to what the Law enjoins, or forbears what the Law expressly prohibits, but also acts or performs those things, about which the Law is silent (that is, whatever is permitted, or in other words, whatever is not forbidden) such a Man may be said *jure agere*, and his Action to be *Jus* or *Res justa*.

For Whatever is not forbidden, is permitted:

*Ejus Mulieris, quam Pater tuus adoptavit, filiam non videris impediri uxorem ducere; quia neque naturali neque civili jure tibi conjungitur*⁹.

⁹ Inst. I. 10 3.

And Whatever is permitted, is lawful. And whatever is lawful, is just. *i. e. Justum*, at least, *Non injustum*. *Just*, not because it is commanded, but because it is not forbidden. And all things are tacitly permitted, which are not expressly forbidden¹.

¹ Arg. D. 3.
3. 8. 1.

² D. 50. 17.
142.

*Qui tacet, non utique fatetur: sed tamen verum est, eum non negare*².

III.

Jus in the third Sense, when attributed to a Person, is

A Moral Quality, annexed to a Person, enabling him to have, or do something justly.

That Moral Quality, by which we justly obtain either the Government of Persons, or the Possession of Things; or by the force of which we may claim something as due to us³.

³ Grot. I. 1. 4.
Pufend. I. 1.
19, 20.

Facultas,

Facultas, five Potestas Legitima ad Rem aliquam habendam, obtinendam vel agendam; ad aliquod commodum percipiendum; vel ad aliquam functionem exercendam; cujus Violatio est Injuria.

And in virtue of this use we say,

Jure meo utor.

Jus Utendi fruendi.

Jus ambulandi per fundum alienum.

Jus rem vindicandi aut persequendi.

Hence the common Definition of Justice: *Constans et perpetua Voluntas Jus suum cuique tribuendi*⁵.

⁵ Inst. 1. 1. pr.

Hence the Title in the Institutes *de Jure Personarum*, correspondent to the Title in the Digests *de Statu Hominum*. For the Quality, State, or Relation of *Master* and *Servant*, of *Paterfam.* and *Filiusfam.* &c. makes a considerable difference in the Circumstances of People's Condition, and consequently very sensibly affects their Rights.

It is thus, that the *Jus* or *Right* consequent upon such and such Situations of Life, is often by the Ancients used to express that *Situation* or that *Condition* itself. Of which I shall produce some remarkable Instances.

*Secutus est, qui in causa impia, victoria etiam foedior, non singulorum Civium bona publicaret, sed universas Provincias regionesque uno calamitatis jure comprehenderet*⁶.

⁶ Cic. II. Offic. 8.

Nec eum esse deceptum, qui id, quod emerat, quo Jure esset, teneret.

That is whether that Estate was Free, or Subject to any Services⁷.

⁷ Id. III. Offic. 16.

*Optimo enim Jure ea sunt profecto praedia, quae optima conditione sunt. Libera meliore jure sunt, quam serva: soluta in meliore causa sunt, quam obligata*⁸.

⁸ Id. III. Agrar. 2.

So again,

*Dum Carthaginenses incolumes fuere, Jure omnia saeva patiebamur*⁹.

⁹ Sallust. Juguth. § 15.

That is, by our *Situation*, *Condition*, or *Circumstances*.

Jus therefore in this sense, as we have seen, is a kind of a moral or legal Faculty, annexed or superinduced to our natural ones: and indeed often cooperates with them. For Faculties are natural Powers, and *Jus* is that which conveys to us the Condition of making use of them lawfully. It is considering the same Act done *physice*, and done *legitime*.

Thus *Ususfructus* is defined, *Jus alienis rebus utendi fruendi salva rerum substantia*¹. And it is said, that *Ususfructus legari potest earum rerum quarum salva substantia utendi fruendi potest esse FACULTAS*². Not but *Jus* and *Facultas* are sometimes taken promiscuously³.

¹ Inst. 2. 4.

Pr.
² Vlpian. tit. 24. § 26.

³ Budæus Annotat. ad Pandect. pag. 212.

Again. Walking is a *natural* Act: but Walking through that Ground where by Law or Custom I may walk, or where in virtue of some Law or Custom, I may be molested, is the *legal* Consideration of the same Performance.

That such an Estate is Arable or Pasture, that it is well Wooded or Watered, is the *natural* Light in which I contemplate that Estate, and the Revenues or Profits arising from it. But when this Estate is considered, as Leased, Let, Mortgaged, or Entailed, in Trust, or in Jointure, subject to the uses of a Will, tyed down for the Payment of Debts, Titheable or Exempt, these are so many *legal* Rights or Circumstances, which attend upon those natural Conditions I was before considering.

And this perhaps is the meaning of that Law of *Celsus*, which has not been yet well understood,

Quid aliud sunt Jura Praediorum, quam Praedia qualiter se habentia, ut Bonitas, Salubritas, Amplitudo *.

* D. 50. 16.
86.

The *Jura Praediorum*, the Rights of an Estate, or the *Legal* Considerations of it (see *Cicero* lately quoted) are those very Estates viewed in the Light of those Modes, Conditions or Circumstances; an Estate so affected, and so attended. Just as in the *Natural* Consideration of the same Estate, the Goodness of the Soil, the Wholesomeness of the Air, &c. are the Modes or Qualities which I can suppose to belong to it. The *Bonitas* &c. here are Comparisons or Illustrations; not Instances, as most Commentators have imagined.

We have above seen, in the first of these three Heads, that Law is *Permissive*, as well as *Obligatory*. In consequence of this, we found in the second place, that an Action may be said to be *Jus* or *Res justa*, which is not only agreeable or conformable to Law, but what is not directly against it: *Non id quod imperatur, verum id quod permittitur*. So here likewise, under my third Head, a Right may accrue to me, not only from what another may be obliged to yield me by some affirmative or positive act of his own, but even negatively by forbearing to interrupt or molest me, in what the Lawgiver has given me leave to do or forbear.

This cannot be better enforced, than by the words of the XII. Tables:

PATERFAMILIAS VTI LEGASSIT SVPER PECVNIAE
TVTELAEVE SVAE REI ITA IVS ESTO.

The Act of Bequeathing by a Testamentary Disposition is well understood to be a Grant, Licence, Concession or Indulgence of Law, or in other words, an Act of the *Law Permissive*. But that Law, which conveys to a testament properly conducted the Idea of a Just Action, (at the same time not condemning me if I dye Intestate) conveys likewise to the Testator a RIGHT, if he thinks proper to assert it, which no Man can lawfully disturb. *Ita Jus esse*.

So that whether the Law speaks to me its sentiments declaratively, as in the case last mentioned, concerning an Act, which I may either do or for-

forbear; or whether it tacitly signifies its Acquiescence, in leaving those things indifferent, which were indifferent before; in both these Cases I am possessed of a Right, which consists in other Men's forbearance.

I cannot conclude this Head without a Reflexion or two upon that Idea we are apt to conceive of *Jus* or Right, when it is defined to be *Jus agendi, vel habendi rem certam*: in other words, *Jus ad agendum, vel Jus ad obtinendum*.

Right thus distinguished may not be improperly called either, *Jus in Re* or *Jus ad Rem*.

The former is discernible in many instances, wherein I can *meo jure uti, pro meo jure agere*, without any regard to the Intervention, Interposition or Concurrence of any other Person. Such is the Idea of Free-hold or Property, and of all those Rights by which a Man acts *by himself*, acquires *to himself*, or in short displays some Powers which the Law has given him, in the many and sundry Capacities of Proprietor, Tenant, Guardian, Testator, Legatee, Buyer or Seller, &c.

(In some of these Cases, as in that of Buyer and Seller for instance, though the Intervention of another Person be necessary to the compleat Execution or Exercise of my Right, yet that affects not the Principle I have laid down, nor is my Right, which I have in these several Characters, disputed, whether I exercise it or not.)

The other, or *Jus ad Rem*, I call a personal Right, by which another Man stands bound to perform some Duty, or fulfill some Contract, which I have an Interest to see performed, or have fulfilled, *Jus ad Rem praestandam*. Hence arises that great variety of mutual Contracts or Obligations by which one Man stands bound to another. Hence the Date of Criminal and Civil Actions, *i. e.* the Right which the Public has to demand from the Subjects of that State, or the contracting Parties from one another, either a Performance of their respective Covenants and Engagements, or a Submission to the Penalties.

The difference is much the same as that between Property and Obligation.

I am sensible, that I have borrowed, this distinction of *Jus in Re*, and *Jus ad Rem*, from the Canonists¹; and now that I have made what use of it I wanted, I return it to them again, by explaining to my Readers, the Sense, in which they understand it.

¹ Extrav. de
Concess.
Praeb.

Jus ad Rem with them may be explained by that Right which is conveyed to a Clerk by the Act of *Institution*, to claim Possession of that Plenitude of Right which is effected by *Induction*. The one gives me *Jus ad Rem*, a Right to acquire: the other *Jus in Re*, or compleat Acquisition. They stand to distinguish between an Abatement and Fulness of Right and to denote the Process from Title to Enjoyment. Thus in the Civil Law, Covenants are compleated by Delivery, or giving Possession,

*Traditionibus — dominia rerum, non nudis pactis, transferuntur*².

² C. 2. 3. 20.

And

And Inheritances by corporal Seizure,

*Cum Heredes instituti sumus, addita hereditate, omnia quidem jura ad nos transeunt, possessio tamen nisi naturaliter ad nos non pertinet*³.

³ D. 41. 2.
23. pr.

There is another Distinction, but not countenanced as I find, by the better Lawyers, of *Jus in Re*, and *Jus ad Rem*. The former of which expresses such Right as belongs to the Proprietor, Landlord, or Mortgager: the other, that of the Tenant or Mortgage.

To return therefore to the distinction which I have established between Property and Obligation, the former is capable of some distribution. It may be over *Goods*, or over *Persons*. Those Goods may be either my own, and thence arises the idea of *Property*, strictly so called (my reader will not be displeased with me for using this word both for Genus and Species, when he shall find the authority I act by, which will be better seen hereafter) or they may be the Goods of another, which owe me some service, and in which I have a title or Interest: and this comprehends the *Jura Praediorum*. For that is the Idea of *Services*, when a Man abates some part of the Right, which he had in an Estate, in favour of another.

— *posteaquam Jus suum imminuit, alterius auxit, hoc est, posteaquam servitutem aedibus suis imposuit*⁴.

⁴ D. 39. 1. 5.
9.

The Right over *Persons* may be that of *Dominion* or Civil Government, the *Jus Parentale*, or *Paternal Authority* (I add not that of *Dominium Herile*, because with the Romans, Slaves differ'd not from Goods) or lastly, it may be *Jus Tutelae*, or the Power of *Guardianship*. Thus *Tutela* is defined to be *Jus, ac Potestas in Capite libero*⁵.

⁵ D. 26. 1. 1.
I. 1. 13. 1.
Gothofred.
ad D. 44. 7.
51.

The common reading is *Vis ac Potestas*; but that *Jus* once prevailed, is plain from the Greek Paraphrase of *Theophilus*, where the former word is rendered or translated, τὸ δίκαιον⁶.

⁶ Land. Enar.
rat. c. ult.

These are the proper, primary and distinct uses of the word *Jus*. Many more, as I observed, may be added; some of a Metaphorical or Figurative Application, others in some degree appertaining to the primitive Sense and reducible to it. For instance,

IV.

In conformity to the third and last Signification of *Jus*, viz. Of a Right or Title, it is understood of the less perfect Right of Consanguinity and Affinity, the *Jura Sanguinis*. Where *Jus pro Cognatione sive Necessitudine*.

*Nonnunquam Jus etiam pro Necessitudine dicimus, veluti est mihi Jus Cognationis vel Adfinitatis*⁷.

⁷ D. 1. 1. 12.
D. 2. 14. 34.
Muelen. ad
Grot. 1. 1. 3.
p. 9. col. 2.
— ad Tit. de
1. et 1. fin.

Jura Sanguinis, Agnationis, Adoptionis &c. pro Officiis, sive Beneficiis &c. Sanguini, Agnationi, Adoptioni, jure tributis. Those which are due *necessitate quadam, et vinculo, Naturae*.

And this is the meaning of the word *Necessitudo* among the Romans,
viz. The Right which is conveyed by Relationship⁸.

*Remisit Hosti judicato necessitudines amicosque omnes*⁹.

*Reliquos Antonii Reginaeque communes liberos, non secus ac necessitudine junctos sibi, et conservavit, et mox pro conditione cujusque sustinuit ac fovit*¹.

*Quibus omnibus, pro necessitudinis Jure, proque meritorum gratia, cruenta mors est persoluta*².

V.

The Place of administering Justice *appellatione collata ab eo quod fit in eo ubi fit*³.

*Jus enim eum solum locum esse, ubi Juris dicendi vel judicandi gratia consistat*⁴.

Hence the Titles in the Digest:

<i>De in Jus vocando.</i>	Lib. II. Tit. 4.
<i>Si quis in Jus vocatus non ierit.</i>	II. 5.
<i>In Jus vocati ut eant</i>	II. 6.
<i>Necquis eum qui in Jus vocabitur, vi eximat.</i>	II. 7.
<i>In Jus de sua re nunquam ivit</i> ⁵ .	

So in the Roman Comedies:

*Ego hunc scelestum in Jus rapiam*⁶.

Age ambula in Jus, Leno. D. Quid me in Jus vocas?

*S. Illic apud Praetorem dicam, sed Ego in Jus voco*⁷.

So Juvenal⁸:

— pupillum ad Jura vocantem.

VI.

Upon the same Principle, for the Celebration of Justice.

Actus in Jure.

Actus Juris dicundi.

Celebratio Litis.

*Bonis cedi non tantum in Jure, sed etiam extra Jus potest*⁹.

*Qui cedit bonis antequam debitum agnoscat, condemnatur, vel in Jus (f. in Jure) confiteatur, audiri non debet*¹.

*Siquis hunc statuit esse Oratorem, qui tantummodo in Jure, aut in Judiciis possit, aut apud Populum, aut in Senatu, copiose loqui*².

So Confessus in Jure³.

VII.

Jus pro Jurisprudencia: the art or study of the Law.

*Juri operam daturum, prius nosse oportet, unde nomen Juris descendat*⁴.

So Doctor, Professor in Jure Civili.

VIII. Prae-

⁸ D. 42. 4. 5. 1.

Cic. pro

Quint. § 4.

⁹ Sueton. in August. § 17.

¹ Id. ibid.

² Id. in Calig. § 26.

³ D. 1. 1. 11.

⁴ D. 11. 1. 4. 1.

⁵ C. Nepos in Attico c. 6.

⁶ Plaut. Rud. III. 6. 21.

⁷ Plaut. Perf. IV. 9. 8.

⁸ Sat. XV. 135.

Add. Cic. pro Quintio. § 25.

Pollet. For.

Rom. I. 4.

Sigon. de

Judic. I. 7.

Rittersh. ad

LL. XII. Tab.

Class. III.

P. 3. c. 1.

⁹ D. 42. 3. ult.

¹ l. 8. eod.

² Cic. I. de

Orat. 11.

³ C. 7. 59.

unic.

⁴ D. 1. 1. pr.

D. 1. 22. 1.

D. 48. 19. 9. 4.

D. 50. 13. 4.

Gell. II. 13.

Muelen. ad

Tit. de I. et I.

pagg. 10. 14.

35. 36.

VIII.

*Praetor Jus reddere dicitur, etiam cum inique decernit, relatione sc. facta, non ad id quod ita Praetor fecit, sed ad illud quod Praetorem facere convenit*⁴.

⁴ D. 1. 1. 11.

*Cum Praetor, cognita causa, per errorem, vel etiam ambitiose, juberet hereditatem ut ex fidei-commisso restitui, etiam publice interest restitui, propter rerum judicatarum auctoritatem*⁵.

⁵ D. 36. 1. 65.
2.

IX.

Jus is often taken for *Jus Strictum*, or the Rigor and Letter of the Law, as it stands opposed to Equity.

*Nulla Juris Ratio, aut, Aequitatis benignitas patitur*⁶ —

⁶ D. 1. 3. 25.
Add. C. 1. 14.
1.

X.

Nay, it is sometimes taken for a received relaxation of strict Law. For
*Multa esse Jure Civili contra rationem disputandi recepta*⁷.

C. 3. 1. 8.

D. 39. 3. 2. 5.
fin.

C. 4. 4. vnic.

⁷ D. 9. 2. 51.
2.

⁸ Noodt. I.

Probab. 2.

II. Observ. 27.

⁹ Hor. 2 Epist.

II. 174.

So the Lawyers, when they say, *Hoc Jure utimur*, &c. they mean, We have this equitable determination on our side⁸.

XI.

Jus, as it signifies a right to *Domini* or property, is sometimes taken for Dominion, or Property itself:

*Permutet Dominos, et cedat in altera Jura*⁹.

Schol. Vet. *in altera Jura, id est, in alterius Dominium.*

Thus absolute Dominion or Property stands distinguished from delegated authority, and lesser powers of Deputation.

*Regnum Numidiae tantummodo Procuracionem existimarem meam: ceterum Jus et Imperium penes vos esse*¹.

¹ Sallust. B.
Jugurth. § 14.

XII.

It is carried higher, and applied to the abuse of that Power or Command:

*Quod si hoc Jure legati P. R. in socios nationesque exteras uterentur, ut pudicitiam liberorum servare ab eorum libidine tutam non liceret, quidvis esse perpeti satius, quam in tanta vi atque acerbitate versari*².

² Cic. III.
Verrin. 27.

*Jam primum omnium satis constat, Troja capta, in ceteros saevitum esse Trojanos; duobus——omne jus belli Achivos abstinuisse*³.

³ Liv. I. 1.

XIII.

Again, as Prescription establishes a kind of Right, it is sometimes used for Custom or long Practice.

⁴ Plin. VIII.
Epist. 4.

*Proinde, Jure Vatum, invocatis Diis, &c*⁴.

XIV. Lastly,

XIV.

Lastly, there are some passages, where *Jus* and *Lex* seem to stand in the same Light, as our Common, and Statute Law.

*Jure, legibus, auctoritate omnium, qui consulebantur, testamentum P. Annius fecerat non improbum*⁵ —

⁵ Cic. III. Ver-
rin. 42.

— *ut liberis ejus bona patria, voluntate patris, jure, legibus, tradita eriperes*⁶.

⁶ Ibid. 44.

I need not add another sense from *Servius*, for I think he is mistaken. But here it follows:

XV.

Jus, as comprehending all manner of Law, whether written or unwritten; and so considered as a Genus, of which *Lex* or written Law is a Species.

*Jus Generale est: sed Lex Juris est Species. Jus ad non scripta etiam pertinet, Leges ad Jus scriptum*⁷.

⁷ Serv. ad
Virg. I. Aen.
511.

XVI.

Nor, *Jus* for Human, Positive Law, as opposed to Moral and Divine.

*Fas et Jura sinunt*⁸ —

*Id est, Divina Humanaque Jura permittunt. Nam ad Religionem Fas, Jura pertinent ad Homines*⁹.

⁸ Virg. I.
Georg. 269.

⁹ Serv. ad loc.

In short, *Jus* is used in a great variety of Senses, according to the Principle that produces it, the Object in which it is engaged, the Person that gives it authority, the Magistrate that directs it, or the Lawyer that compiles it. As *Jus Naturale, moribus introductum, Civile*. — *Jus Quiritium, Italicum, Provinciale*. — *Jus Justinianum*. — *Jus Praetorium, Honorarium*. — *Jus Papirianum, Flavianum, Aelianum, &c.*

Thus every new Law or SCtum produced *novam speciem Juris*; as the *Jus Pegasianum*:

*Jus introductum a SCto Pegasiano, quod ad exemplum Falcidiae Pegasus rogavit*¹.

To which may be added, that the *Jus Trium Liberorum* expresses those Privileges, which attended a Roman Citizen, so circumstanced, and so well recommended to his Country.

¹ σχ. Vet. Ju-
ven. IV. 77.
Menag. A-
moen. I. C.
C. 17.

PUBLIC AND PRIVATE L A W.

Muelen. Comment. ad Tit. D. de Jure et Justitia, p. 45 — 58.

Cujacius XXVII. Observ. 36.

—— XV. ——— 33.

Raevardus V. Var. 12.

SCRIPTORES DE IVRE PVBLICO.

J. Limnaei Jus Publicum.

Domat's Treatise of Public Law.

Vitriarius, Oldenbergerus, and many German writers of late.

H*VIVS* Studii duae sunt Positiones: Publicum et Privatum. Publicum Jus est, quod ad statum Rei Romanae spectat. Privatum, quod ad singulorum utilitatem. Sunt enim quaedam publice utilia, quaedam privatim. Publicum Jus in Sacris, in Sacerdotibus, in Magistratibus consistit. Privatum ———

¹ D. I. I. 1. 2.

J. I. I. 4.

And agreeable to this is that Passage in the Greek Scholiast upon *Apthoni*,

Τῶν νόμων οἱ μὲν εἰσι ΚΟΙΝΟΙ, ὡς οἱ καθόλου περὶ τῶν τῆς πόλεως· οἱ δὲ ἸΔΙΟΙ, οἱ περὶ τῶν πρὸς ἀλλήλους συμβολαίων.*

² p. 25. juxta
fin.

Nor is that Passage in *Demosthenes* less remarkable:

Ἐστὶ δύο εἶδη, περὶ ὧν εἰσιν οἱ νόμοι κατὰ πάσας τὰς πόλεις. ὧν τὸ μὲν εἷς, δι' ὧν χρώμεθα ἀλλήλοις, καὶ συναλλάττομεν, ἢ ΠΕΡΙ ΤΩΝ ἸΔΙΩΝ· ἢ χρὴ ποιεῖν διωρίσμεθα, καὶ ζῶμεν ὅλως τὰ πρὸς ἡμᾶς αὐτὰς· τὸ δὲ, ὃν τρόπον δεῖ ΤΩΙ ΚΟΙΝΩΙ τῆς πόλεως ἕνα ἕκαστον ἡμῶν χρῆσθαι, εἰάν ποτε λιτεύεσθαι βέληται, καὶ φῆ κήδεσθαι τῆς πόλεως.³ §

³ C. Timocrat. Vol. III.
p. 433. Edit.
Cant.

T. AELIO. T. F.

LARGO.

EQ. R. PROC. AVG.

BYBLIOTHECARV...

IVRIS PVBLICI....

PRIVATI.....⁴

⁴ Fabrett.
p. 198.

* *Legum aliae sunt publicae, veluti in genere quae ad res Civitatis pertinent: aliae privatae, quae de mutuis Civium contractibus.*

§ *Duo habentur genera rerum, propter quas in singulis urbibus legum adminicula requiruntur; alterum, quo de consuetudine vitae, de contractibus, de privatis negociis, atque adeo de consociatione, et communitate inter nos ipsos, quid sit agendum, constituimus: alterum, quo pacto unusquisque nostrum paratus et affectus esse debeat erga Remp. si eam administrare instituerit, seque curam suscepisse civitatis profiteatur.*

Tully

PUBLIC AND PRIVATE LAW.

59

Tully calls those *publica Jura, quae sunt propria Civitatis atque Imperii*.¹ I. de Orat.

Τὸ κοινὸν τῆς πόλεως ἀγαθόν⁶. *

Τὸ κοινῇ συμφέρον⁷. †

The Distribution according to some is threefold,
*Genera sunt tria, Sacri, Publici, Privati Juris*⁸.

Jus Triplex —

*Sacrum, Privatum, et Populi Commune quod usquam est*⁹.

So again,

*Vt inter divinum, publicumque Jus, et privata commoda competens discretio sit*¹.

Sacrum and *Publicum* stand distinguished in Authors and Inscriptions;

..... NATVS

COSOLTV FE

AVT SACROM

AVT POVLIC.

LOCOM ESE O

CENSVERE.

Venusiae.

Q. RAVEIO

P. COMINIO C.F.

L. MALIO C. F.

QVAISTORES

SENATVD

COSOLVERE

IEI CENSVERE

AVT SACROM

AVT POVLICOM

ESE².

² Fabrett. I. 7.

But this *Divisio trimembris*, by a Subdivision of one of the branches, is by others reduced to a twofold Distribution of *Jus*, into *Public* and *Private*: under the former of which is comprehended the *Jus Sacrum*.

*Multae sunt domus in hac urbe, P. C. atque haud scio an pene cunctae jure optimo, sed tamen jure privato, jure hereditario, jure auctoritatis, jure mancipii, jure nexi. Nego esse ullam domum aliam aequae privato jure atque optima lege, publico vero omni praecipuo et humano et divino jure munitam*³.

*Publica privatis secernere, sacra profanis*⁴.

All Law is either Public or Private. Public again is divided into *Sacrum*, which concerns Religion, and public Worship, Priests, and Sacrifices: and *Non-Sacrum*, such as the Regards of Magistrates, of the Establishment, and of public Peace.

³ Cic. de Harusp. respons.

§ 7.

⁴ Hor. A. P.

397.

* *Commune Civitatis bonum.*

† *Id quod publice interest.*

And this Distribution is more prevalent, as well as more commodious.

³ Liv. III. 34.

*Fons omnis publici privatique Juris*¹.

⁴ D. 1. 2. 2. 46.

*Tubero doctissimus habitus est Juris publici et privati*⁴.

⁵ Plin. I. Epist.

*Quam peritus ille et privati Juris et publici*⁵?

22.

⁶ Gell. X. 20.

*Ateius Capito publici privatique Juris peritissimus*⁶.

Whatever therefore regards the Public, the Constitution, the Government *quod ad Statum Rei Romanae spectat*, is called Public Law: whereas Private Law regards Private Property, Rules concerning Contracts between Party and Party, Causes of *Meum* and *Tuum*; such in short where the Interest of the State, and the Constitution of the Government is not *primarily* and *immediately* concerned.

I made use of the Words *primarily* and *immediately*, because these two Considerations, however distinct in their Principles, and Original, have nevertheless a reciprocal and secret Connection, whereby the preservation of the one frequently implies that of the other.

⁷ Paraphr.
Aristot. Nicomach. I. 2.
where see
more.

Τὸ αὐτὸ ἀγαθὸν ζητεῖται καὶ παρὰ ἐνὸς ἀνθρώπου, καὶ παρὰ πόλεως⁷.*

The Public or Community is interested in the happiness of Individuals: and public Peace sometimes depends upon the Faith and Execution of private Contracts; I mean in a secondary consideration.

And v. v. the Interest of private Men is consequentially concerned in public Peace and Tranquillity.

Thus that Maxim is generally true, *Si Principi bene est, Civibus male esse nequit*; and on the other hand, *Publice expedire, nequis re sua male utatur, nec aliena*.

This is in no respect better illustrated than by that Right, which all well-established Governments have claimed over the *private* Department of Individuals. That the Law should regard the Transactions of Contracts and Stipulation between Party and Party, is level to all Apprehensions, for this was one great end of its Institution. But the public Interest is also supported by those Duties which a Man owes to himself. Otherwise the Laws had never enjoined Sobriety, or had punished personal Excesses. And the Public moreover avails itself, by its Sumptuary Laws, of that Discretion and Moderation, which every Man ought to make use of in the Management of his own private Property.

⁸ Athen. IV.
19.

Τὰς ἀσώτους, καὶ τὰς μὴ ἐκ τινὸς περιστάσεως ζῶντας τὸ παλαιὸν ἀνεκαλεῖσθαι οἱ Ἀρεοπαγῖται, καὶ ἐκόλαζον⁸.†

With my Author follows that memorable Story of two young Philosophers, who were cited by that Court to account for their manner of Life;

* *Idem bonum quaeritur et ab uno homine et a Civitate.*

† *Prodigos et qui ad vitam e re sua familiari nihil comparcerent, Areopagitae olim soliti injus vocare punireque.*

viz. how it came to pass, that their plight and appearance was so good, when it was evident, they had no Fortunes, and yet spent their whole time in the study of Philosophy. They desired a certain Miller to be sent for; who appearing, deposed, That these two young Fellows worked at his Mill every Night, and earned their two Drachmae apiece. Upon which that judicious Assembly was struck with Admiration, and ordered them a Present of Two hundred.

In that Republic the *Idleness* of the Subject was cognizable by the Magistrate.

Apud Athenienses Inertia e latebris suis, languore marcens, in forum perinde ac delictum aliquod, protrahitur, fitque ut erubescendae, ita facinorosae rea culpa. Est et ejusdem Urbis sanctissimum Concilium, Areopagus: ubi quid quisque Atheniensium ageret, aut quonam quaestu sustentaretur, diligentissime inquiri solebat, ut homines honestatem, vitae rationem memores reddendam esse, sequerentur.

^o Valer. Max.
II. 6. 3. 4.
Add. Lect.
Lysiac. Cap.
X.

By a Constitution of Solon, there lay an Action also against Cowardice.

Εἰσὶ γὰρ καὶ ΔΕΙΔΙΑΣ γραφαί. καίτοι θάυμάσειεν ἂν τις ὑμῶν εἴ εἰσι φίσεως γραφαί. εἰσὶ. τίνος ἕνεκα; ἵνα ἕκαστος ἡμῶν τὰς ἐκ τῶν νόμων ζημίας φοβούμενος μᾶλλον ἢ τὰς πολεμίας, ἀμείνων ἀγωνιστὴς ὑπὲρ τῆς πατρίδος ὑπάρχῃ.*

¹ Aeschin. c.
Ctesiph. Tom.
II. pag. 432.
Edit. Cant.
² pag. 9. of
this Treatise.

It can be no question, if these two Interests should happen to clash, which is to give way. *Isocrates*, as we have seen lately ², recommends the Constitution of his Country, upon this very Principle, among others, *viz.* That the Athenians in their Legislation paid more attention to the *Jus Publicum* than *Privatum*.

Thus though no Man is regularly obliged to part with his Estate or Goods ³: Yet, what if the Public wants them? Wants his Grounds for a necessary Road? Or his Corn, in a general Famine ⁴?

³ D. 25. 2. 9.
C. 4. 38. 11.
⁴ Pufend.
VIII. 5. 7.
Grot. I. 1. 6.
and II. 14. 7.
and III. 20. 7.

So in public Distress, every Man is bound to contribute to the State, even in preference to his private Debts and Contracts.

And with us, when the Goods of the Deceased are not sufficient for the Payment of all his Debts, those due to the Crown are directed to be first satisfied by the Executor, though last contracted; and the common Rule of Law must give way, *Qui prior est causa, potior est jure*.

The Words of *Vlpian* are, *ad statum Rei Romanae*, which *Hotoman* and *Raevardus* injudiciously alter into *Reipublicae*. *Res Romana* is the same with *Res publica*.

Publica Appellatio in compluribus causis ad Pop. Romanum respicit: Civitates enim privatorum loco habentur ⁵.

⁵ D. 50. 16.
15, 16.

* Nam et timiditatis actiones sunt. Quamvis mirum alicui vestrum videri queat, aliquas esse in naturam actiones. Sunt. Qua gratia? Vt quisque nostrum poenas legibus constitutas magis quam hostes metuens, fortius pro patria propugnet.

³ Inst. 2. 1. 2.And so Theophilus³:

Ποταμοὶ δὲ πάντες καὶ λιμένες ΠΟΥΒΑΙΚΟΙ εἰσὶ, τετέστι, τῷ ΔΗΜΟΥ
ΤΟΥ ΡΩΜΑΙΚΟΥ.*

Publicus qu. Populicus. And wherever *Populus* or *Civitas* is mentioned, there the People of Rome, or the City of Rome, is always understood to be meant.

⁶ I. 1. 2. 2.

Thus though *Jus Civile* is the Common Law of any State, if nothing be added to restrain it, the Roman Law is understood⁶.

⁷ De C. D. XIX. 21.

In this Application *Res* is very often used. So that Cicero (as we learn from S. Austin⁷) in his Books *de Republica*, defined *Rempublicam esse Rem Populi*.

⁸ Aufon. Idyll. XII.⁹ Hor. 2. Epist. I. 2.¹ Virg. II. Georg. 535.² Ovid. XIV. Met. 609.³ Id. XIV. 808.⁴ Id. XV. 438.⁵ Id. XV. 447.⁶ Hor. 4. Od. XV. 17.⁷ Liv. I. 23.⁸ Ennius.⁹ Virg. VI. Aen. 858.¹ Id. III. Aen.

1.

² Id. ibid. 54.

*Imperium, Litem et Venerem cur una notat RES*⁸?

*Res Italas armis tuteris, moribus ornes*⁹.

*Scilicet et Rerum facta est pulcherrima Roma*¹.

Inde sub Ascanii ditione binominis Alba,

*Resque Latina fuit*².

—quoniam fundamine magno

*Res Romana valet*³.

*Cum Res Trojana labaret*⁴.

Sed Dominam Rerum de sanguine natus Iuli

*Efficiet*⁵,

*Custode Rerum Caesare*⁶ —

*Res Romana — Etrusca*⁷.

*Moribus antiquis stat Res Romana, virisque*⁸.

Hic Rem Romanam, magno turbante tumultu,

*Sistet*⁹

*Postquam Res Asiae*¹ —

*Res Agamemnonias, victriciaque arma secutus*².

In both which places *Servius* explains *Res* by *Imperium*.

We come now to enquire what are the proper Objects of *Jus Publicum*.
viz.

*Religion and Divine Worship, — Peace and War. — Legislation. —
Exchequer and Res fisci. — Escheats. — The Prerogative. — Law of
Treasons. — Taxes and Imposts. — Coinage. — Jurisdiction.
Magistracys. — Regalia. — Embassys. — Honors and Titles.
Colleges, Schools, Corporations. — Castles and Fortifications. — Fairs,
Mercats, Stable. — Forrefts. — Naturalization, Jus Civitatis*

* Fluvii autem omnes et Portus publici sunt, id est, Populi Romani.

and briefly, *quicquid ad Principem, ad Leges, ad publica Judicia et Res Civitatis pertinet.*

In short, in whatever Case the People in their collective Capacity can be supposed a Party. So *Cicero* speaks of the *Leges de Rebus repetundis*, or the Complaints of the Provinces.

*Nam civibus cum sint ereptae pecuniae, civili fere actione, et privato jure repetuntur. Haec Lex Socialis est, hoc Jus Nationum exterarum est*¹.

¹ Cic. in Q. Caecil. § 5.

(Hence perhaps in our own Constitution, the Kings Bench originally for Cognizance of Affairs in *Jure publico*, and the Court of Common Pleas for the Decision of *Meum* and *Tuum* between Party and Party.)

Of this sort is the *Jus FAECIALE*, or Law of Arms.

*Well ratified by Law and Heraldry*².

² Shakesp. Hamlet.

*Ac belli quidem Aequitas sanctissime Faeciali P. R. jure perscripta est; ex quo intelligi potest, nullum bellum esse justum, nisi quod aut rebus repetitis geratur, aut denunciatum ante sit et indictum*³.

³ Cic. 1. Offic. 11.

*Cum justo enim et legitimo hoste res gerebatur: adversus quem et totum Jus Faeciale, et multa sunt jura communia*⁴.

⁴ Id. ib. III. 29.

*P. R. missis Xviris ab ipsis [Faliscis] Jura Faecialia, et nonnulla supplementa XII Tab. accepit, quas habuerant ab Atheniensibus*⁵.

⁵ Serv. ad Virg. VII. Aen. 695.

Jus SACRVM, OR SACERDOTII.

*Cum sciam, Domine, ad testimonium laudemque morum meorum pertinere tam boni Principis judicio exornari, rogo, dignitati, ad quam me provexit Indulgentia Tua, vel Auguratum vel vii viratum, quia vacant, adjicere digneris, ut jure Sacerdotii precari Deos pro Te publice possim, quos nunc precor pietate privata*⁶.

⁶ Plin. X. Epist. 8.

Jus SENATORIVM.

*Cum sis peritissimus et privati Juris et publici, cujus pars Senatorium est*⁷.

⁷ Id. VIII. 14.

THERE are some Passages in the Law Books, where the Ideas of *Jus Publicum* and *Privatum* are not very distinct. That is

1. Either the same *Jus* may under different circumstances be *Publicum* or *Privatum*.

Or 2dly.

All Law in general may be called *Public Law*, ex *Causa efficienti*.

Or 3dly.

All Law may be called *Public* ex *Causa finali*, as directed to all Men, and distinguished from *Privilegium*, or *Lex Privata*: i. e. *Privata*.

I. The

I.

The same Thing may in some sense be said to be *publici Juris*, in other regards, *privati*.

¹ D. 28. 1. 3.

Leonin. VI.

Emend. 17.

Charond. II.

Verisim. 12.

² Lexicon Ju-

ridicum, v.

PUBLICI

IVRIS.

³ V. Var. 12.

*Testamenti Factio non privati, sed publici Juris est*¹.

*Calvin*² has a good deal upon this head. He maintains that the Copies have been interpolated, and that *Papinian* wrote, *non publici, sed privati Juris*. And so *Raevardus*³ likewise. But I think they are mistaken.

For Wills, though they principally regard Possessions and private Property, yet anciently, like Acts of Legislation, like Adoptions, Creations of Magistrates, &c. were performed with the greatest degree of Solemnity, with all Legal and Religious Ceremonies, *Comitiis Centuriatis*, at the general Assembly of the whole Community, when Laws only could be enacted. And *Legare* accordingly has been observed to be a Term of Legislation.

⁴ Novell. 22.

2. pr.

⁵ Vlpian. Tit.

24. § 1.

ΝΟΜΟΘΕΤΕΙΤΩ μὲν γὰρ ἕκαστος ἐπὶ τοῖς ἑαυτῷ τὰ εἰκότα, καὶ ἔσω ΝΟΜΟΣ ἢ τὰτῶ Βελή⁴. *

*Legatum est, quod legis modo — testamento relinquitur*⁵.

Or, in another Light, *Testamenti factio* may be said to be *Juris publici*, because the Rules of making a Will were not left to the Direction of the Testator, but circumscribed by Law.

For instance,

A *Paterfam.* could not, however desirous, enable his Son to make a Will.

⁶ D. 28. 1. 6.

⁷ D. 38. 2.

47. 2.

*Qui in potestate Parentis est, testamenti faciendi jus non habet: adeo ut quamvis Pater ei permittat, nibilo magis tamen jure testari possit*⁶.

Nor a Patron his Freedman⁷.

Yet this Father could empower his Son, *donare mortis causa*.

⁸ D. 39. 6. 25.

⁹ D. 50. 12. 2.

*Tam is qui Testamentum facit, quam qui non facit, mortis causa donare potest. Filius fam. qui non potest facere testamentum, nec voluntate patris, tamen mortis causa donare, patre permittente, potest*⁸.

And enabled him also to alienate by Vow or Consecration⁹.

II.

Again, in regard to the *Causa Efficiens*, the Authority by which all Laws are enacted, *Jus* in general, all Law, may be said to be *Publicum*.

And thus *Jus Publicum* stands opposed to private Bargains and Contracts: or, in other words, the Law of the Land, and whatever Right is

* Legem ferat unusquisque de rebus suis, ut dignum est, et sit Lex ejus voluntas.

acquired by it, is opposed to that Right, which may be acquired by private Stipulation, Donations, or Legacies.

*Jus publicum privatorum pactis mutari non potest*¹.

¹ D. 2. 14. 38.

*Privatorum Conventio Juri publico non derogat*².

² D. 50. 17.

*Testandi de pecunia sua legibus certis facultas est permessa, non autem Jurisdictionis mutare formam, vel Juri publico derogare cuicumque permissum est*³.

45. 1.

³ C. 6. 23. 13.

And *Jus Publicum* in this Sense is sometimes called

Jus Solenne.

*Nec ex Praetorio, nec ex solenni Jure privatorum conventionem quicquam immutandum est*⁴.

⁴ D. 50. 17. 27.

Jus Commune.

*Generaliter quoties pactum a Jure communi remotum est, servari hoc non oportet*⁵.

⁵ D. 2. 14. 7. 16.

Juris Civilis Regulae.

*Contra Juris Civilis Regulas pacta conventa rata non habentur*⁶.

⁶ D. 2. 14. 28. pr.

Leges.

*Nemo potest in testamento suo cavere, ne Leges in suo testamento locum habeant*⁷.

⁷ D. 30. 1. 55.

Jus Reip.

*Jus Reipublicae pacto mutari non potest*⁸.

⁸ D. 50. 8. 2. 8.

III.

Or it may be understood not so much of the public Authority which enacts it, as of its public use and application, it being common to all the Members of that State. Thus it stands distinguished from *Privilegium*, or a Law made in favour of particular Persons, which is not to be extended to Generals⁹.

⁹ I. 1. 2. 6. C. 4. 12. 2.

And in this Sense we have it in *Terence*,

*An ne hoc quidem Ego adipiscar, quod Jus publicum est*¹?

¹ Phorm. II. 3. 65.

And this is often called *Jus Commune*.

*Non capitur qui Jus publicum sequitur*². And again,

² D. 50. 17.

*Non videtur circumscriptus esse minor, qui Jure sit usus communi*³.

116. 1.

³ C. 2. 22.

How the same thing may be both Public and Private, is well imagined by *Cujacius*.

*Sicut Aggenus Urbicus privatos agros etiam publicos dici, quod publico tributa et vectigalia pensitant, πρὸς ἀντιδιαστολήν eorum qui nihil pensitant, etiam si non sint propria P. R. Idemque eleganter Publicum Privato esse consortem, quia dum privatus laborat in proprio, et tributum publico, et sibi alimoniam, arva excolendo procurat*⁴.

⁴ XXVII. Olf.

UNDER the Notion of *Jus Publicum* is included, as we have seen, *Jus Sacrum*, or *Jus ad res Divinas pertinenens*.

⁵ C. I. 17. 1. 1.

*Legum Auctoritas, quae et divinas et humanas res bene disponit*⁵.

Hence *Jurisprudentia* is defined, *Divinarum atque humanarum rerum*

⁶ D. I. 1. 1. 1. 2. *notitia*⁶.

I. 1. 1. 1.

This Definition has been observed to correspond much with the Definition given, of *Philosophy*, or rather *Sapientia*:

⁷ Cic. I. Offic.

43.

*Illa autem Sapientia, rerum est divinarum atque humanarum scientia*⁷.

⁸ Id. II. 2.

*Sapientia est, ut a veteribus philosophis definitum est, rerum divinarum et humanarum, causarumque quibus haec res continentur, scientia*⁸.

And no wonder, as the Roman Lawyers affected a great Union with ⁹ D. I. 1. 1. 1. 1. *Philosophy*⁹, with that of the Stoics particularly:

¹ Plutarch. de

Placit. Philosoph. init.

Οἱ μὲν ἐν Στωϊκοῖς ἔφασαν τὴν μὲν Σοφίαν εἶναι ΘΕΙΩΝ τε καὶ ΑΝΘΡΩΠΙΝΩΝ ἐπιστήμην¹. *

² Senec. Epist.

89.

*Quidam sapientiam ita finierunt, ut dicerent, eam divinarum et humanorum scientiam. Quidam ita: Sapientia est, nosse divina et humana, et horum causas*².

Hence it is said constantly of the old Lawyers, that they were *Juris divini et humani periti*.

So

Draco. — *Gell. XI. 18.*

Numa. — *Liv. I. 18.*

Ateius Capito. — *Tacit. III. Annal 70.*

Cocceius Nerva. — *Id. VI. 26.*

³ Liv. XXXIX.

16.

*Judicabant enim prudentissimi Viri omnis divini humanique Juris, nihil aequae dissolvendae Religionis esse, quam ubi non patrio, sed externo ritu sacrificaretur*³.

⁴ Valer. Max.

VIII. 8. 2.

Q. Mucius Scaevola — *cum bene ac diu Jura Civium et Ceremonias Deorum ordinasset*⁴.

Hence also we have upon record an account of several Books composed by Roman Lawyers *de Rebus sacris et ad Religionem pertinentibus*.

And indeed the whole Book of *Cicero de Legibus* is a proof of this Connection. It was intended to contain a System of Laws, drawn from Philosophical Principles, and part of them, which remain, are of this Cast; viz. *Rules regarding Religion and Divine Worship*.

It is plain, that this Performance of *Cicero* (and that lost one also *de Republica*) was upon the Plan of his Master *Plato*. And yet I think he had no great Encouragement to attempt a Work of this nature. These private, unauthorized Systems made but little impress upon the minds of either People. *Plato's* in particular met with a cold reception, if we can credit an old Writer.

* *Stoici dixerunt Sapientiam esse rerum divinarum humanarumque scientiam.*

Καί τοι γε ἔδει, καθότιπερ τὸν Λυκῆργον τὲς Λακεδαιμονίης, καὶ τὸν Σόλωνα τὲς
 Αθηναίων, καὶ τὸν Ζάλευκον τὲς Θερύης, καὶ αὐτὸν [Πλάτωνα], εἴπερ ἦσαν
 χρήσιμοι, πείσαι τινὰς τῶν Ἑλλήνων αὐτοῖς χρῆσασθαι — ὁ δὲ Πλάτων
 πῶς ἐκ ἁτοπῶν, τριῶν Αθηναίων γενομένων νομοθετῶν, τῶν γε δὴ γνωρι-
 ζόμενων, Δρακονίδου, καὶ αὐτὸς τῷ Πλάτωνι, ὁ Σόλων, τῶν μὲν τοῖς νό-
 μοις ἐμμένειν τὲς πολίτας, τῶν δὲ τῷ Πλάτωνι ὁ προσκαλεσθεὶς ἄνθρωπος;⁹ *
 9 Athen. l. XI. fin.

I should now proceed to speak to the *Jus Sacrum* of the Romans, but am tempted by what I just now hinted, concerning the relation between Roman Law and Philosophy, to make a little digression, and see what tint the Former took from the school of the Stoics.

This has been observed by many before me¹, and by some perhaps, as it generally happens in cases of this nature, has been carried beyond what it could reasonably bear.

There have not been wanting some, who could descry a striking likeness between that Sect of Philosophers, and the Tenets of the Pharisees:

Η Φαρισαίων αἵρεσις παραπλήσιός ἐστι τῇ παρ' Ἑλλήσι Στωϊκῇ λεγομένη.[†]

And St. Jerome carries it yet farther:

Stoici nostro dogmati in plerisque concordant¹.

However, we are well assured of a particular nicety or caution attending that Class of Philosophers, in that great instance of Refinement, of which this Passage of *Plutarch*² is an Instance:

Animals with them are said, ἐ θυμῷ δα, ἀλλ' ὥς ANEI ΘΥΜΟΥΣΘΑΙ, ἐ φοβείσθαι, ἀλλ' ὥς ANEI ΦΟΒΕΙΣΘΑΙ, ἐ βλέπαι, ἀλλ' ὥς ANEI ΒΛΕΠΕΙΝ.[†]

Mirabile videtur, quod non rideat haruspex, cum haruspicem viderit. Hoc mirabilius, quod vos inter vos risum tenere possitis. Non est corpus, sed quasi-corpus. Hoc intelligerem quale esset, si id in ceris fingeretur, aut fictilibus figuris: in Deo quid sit quasi-corpus, aut quasi-sanguis, intelligere non possum³.

From hence the Roman Lawyers borrowed, what their books are so full of, their Fictions of *Quasi-Possessio*⁴, *Quasi-Publica Accusatio*⁵, *Quasi-Maleficium*⁶, *Quasi-Castrense Peculium*⁷, *Quasi-Vsufuctus*⁸, and innumerable more of the same sort, where the Equity of the Law admits of a seeming impropriety for the sake of public utility: *Cum Juris Potestas aliquid censet esse, quod revera non est*, as the Lawyers write. And such

* Nam oportuit, quemadmodum Lycurgus Lacedaemonios, Solo Athenienses, et Zaleucus Thurios, ita et eum quoque [Platonem] si utiles fuissent, quibusdam Græcorum persuasisse, ut iis uterentur. — Ineptum Platonem inde fuisse constare, quod, cum illustres apud Athenienses tres Legislatores fuerint, Draco, Solo, et ipse Plato, illorum leges Cives observarint, Platonis vero nihil fecerint atque irriserint.

† Phariseorum Secta affinis est ei quæ a Græcis vocatur Stoica.

† Non irasci, sed quasi-irasci, non timere, sed quasi-timere, non videre, sed quasi-videre.

Fictions as these constitute what are called *Vtiles Actiones* in the Civil Law, of which we shall see more hereafter.

This is in no Instance more visible, than in the case of Slavery.

² D. 23. 3. 39.

*Si serva servo quasi-dotem dederit*²——

³ D. 15. 1. 47.
fin.

*Quia quasi-patrimonium liberi hominis peculium servi intelligitur, ubicunque esset*³.

⁴ D. 23. 2. 14.

So *Quasi-Noverca*, *Quasi-Nurus*, *Quasi-Socrus*, are the expressions made use of in *Servilibus adfinitatibus*⁴.

⁵ Plin. VIII.
Epist. 16.

*Permitto Servis quoque quasi-testamenta facere, eaque ut legitima, custodio. — Nam Servis Resp. quaedam et quasi-civitas domus est*⁵.

Though it is extended to other Considerations also.

⁶ D. 1. 9. 6. 1.

*A Senatore in adoptionem filius datus ei qui inferioris dignitatis est, quasi-Senatoris-filius videtur*⁶.

⁷ D. 1. 9. 7.
Pr.

*Emancipatum a Patre Senatore, quasi-Senatoris-filium haberi placet*⁷.

But the strongest Feature of their Agreement is that Strain of Etymology, which has been imagined to have set the Stoics and Civilians at a distance from all the world besides.

⁸ in Bruto § 31.

⁹ Laert. l. 7.
n. 111. seq.

¹⁰ Id. l. 7. n. 60.
199. 200.

It is for this reason, that *Tully* calls the Professors of that School, *Architecti pene verborum*⁸. It is to this, that we owe the vast Heaps of Definitions in *Laertius*' Life of *Zeno*⁹, and that *Chrysippus* was Author of several Treatises of Definitions and Etymologies quoted by the same Writer¹⁰.

² Cic. I. Offic.
7.

³ Quintilian.
V. 14.

⁴ Gell. XIII.
10.

⁵ Cic. in Brut.
§ 41.

*Audeamus imitari Stoicos, qui studiose exquirunt unde verba sint ducta*².

*Cum etiam ipsi Icti, quorum summus circa verborum proprietatem labor est, litus esse audeant dicere, qua fluctus eludit*³.

*Labco Antistius Juris quidem Civilis disciplinam principali studio exercuit. — Latinarumque vocum origines rationesque percalluerat: eaque praecipue scientia ad enodandos plerosque juris laqueos utebatur*⁴.

*Sic enim, inquam, Brute, existimo Juris Civilis magnum usum et apud Scaevolam et apud multos fuisse, artem in hoc uno [Sulpicio]. Quod nunquam effecisset ipsius Juris scientia, nisi eam praeterea didicisset artem quae doceret rem universam tribuere in partes, latentem explicare definiendo*⁵.——

Of the Roman Lawyers many are recorded to have taken up with this Philosophy.

P. RUTILIUS.

⁶ Ibid. § 30.

*Rutilius—magnum munus de Jure respondendi sustinebat. Sunt ejus Orationes jejunae: multa praeclara de Jure: doctus Vir, et Graecis literis eruditus, Panaetii auditor, prope perfectus in Stoicis*⁶.

SEXT.

SEXT. POMPEIUS.

*Nam Sextus, frater ejus, praestantissimum ingenium contulerat ad summam Juris Civilis, et ad perfectam Geometriae et rerum Stoicarum scientiam*⁶.

⁶ Id. ibid. 47.

Q. AELIVS TVBERO.

*M. autem Cicero in libro qui inscriptus est de Jure Civili in artem redigendo verba haec posuit: NEC VERO SCIENTIA IVRIS MAIORIBVS SVIS Q. AELIVS TVBERO DEFVIT, DOCTINA ETIAM SVPERFVIT. In quo loco superfuit significare videtur supra fuit et praestitit, superavitque majores suos doctrina sua superfluenti, tum et nimis abundanti. Disciplinas enim Tubero Stoicas et Dialecticas percalluerat*⁷.

⁷ Gell. I. 21.

Of the two Tubero's produced by Pomponius in his List of Roman Lawyers,

Quintus Tubero ille Stoicus, Pansae [or rather *Panaetii*, as all the Critics agree] *auditor*⁸.

⁸ Anton. Augustin.
G. Grotius.
Muelen.
Eberlin.
Bynkersh.
Cujac.
Rupert.
Bertrand.
Muretus, etc.

*Post hoc quoque Tubero fuit, qui Ofilio operam dedit: Fuit autem Patricius, et transiit a causis agendis ad Jus Civile — doctissimus — Juris publici et privati, et complures utriusque operis libros reliquit. Sermone etiam antiquo usus affectavit scribere: et ideo parum libri ejus grati habentur*⁹.

⁹ D. 1. 2. 2.
40.
D. 1. 2. 2.
46.

I say of the two, I would rather accommodate the relation of *A. Gellius* to the latter than the former, though that is not the prevailing opinion of Commentators.

Among other reasons let this pass for one: That when He is said by *Cicero*² to match his Ancestors in the knowledge of the Civil Law, and to exceed them in Learning, it is more reasonable to understand him of the last, than of the first, of the Family, who figured in that Profession.

The Attention of the Tubero Race to the Stoical Philosophy is upon Record.

*Ista Secta Tuberones et Favonios veteri quoque Reip. ingrata nomina genuit*³.

³ Tacit. XVI.
Annal. 22.

Some People remark a kind of fatality in several hereditary Attachments, by which many Roman Families have been distinguished. The *Gens Mucia* is observed to have stocked that City with many very excellent Lawyers:

*Quid? haec Jura Civilia, quae jampridem in nostra familia — versantur*⁴.

⁴ Cic. I. de
Orat. 10.

Said by *Q. Mucius Scaevola*.

Quorum

⁵ Cic. I. Offic.^{32.}⁶ Liv. IV. 29.
VIII. 7.

Gell. IX. 13.

⁷ Phil. Carol.

Animadvers.

in Agell. I. 5.

⁸ II. Verrin.^{10.}⁹ I. 2. 10. pr.

Gell. VI. 12.

¹ D. 12. 1. 2.² D. 15. 1. 5.^{3.}⁴ D. 41. 2. 1.

pr.

⁴ D. 39. 6. 35.^{1.}⁵ D. 47. 2. 1.

pr.

⁶ D. 3. 2. 4. 4.

D. 47. 15. 1.

pr.

⁷ Harmeno-

pul.

⁸ Gell. XIII.^{10.}

See Menag.

Amoenit. I. C.

c. 39.

Duker. de La-

tinit. I. Cto-

rum pagg.

23—32. 426.

1eq.

Cujac. XI. Ob-

serv. 37.

Gebaueri

Praefat. ad

Trekell. de

Orig. Testa-

menti factio-

nis.

Alciat. I. Dis-

punct. 1.

—IX. Parerg.

^{21.}

—VI. Para-

dox. 9.

Forster. II.

Observ. Suc-

cisiv. 3.

Scip. Gentil.

Origg. ad

Pandect. lib.

sing.

Quorum vero Patres aut Majores aliqua gloria praestiterunt, ii student plerumque eodem in genere laudis excellere, ut Q. Mutius P. F. in Jure Civili.

The rigid Severity of the *Manlii* produced the remarkable Expression, *Manliana Imperia*⁶, and, I am persuaded, fastened the Surname *Imperiosus* upon a branch of that Family; as was usual with the Romans, and was that which gave birth to their *Agnomina*. Which at first were nothing more than Nick-names, or marks of Reproach and Scurrility⁷. Lastly, the repeated Consulates in the House of the *Metelli* (one of which Family had four Consular Sons living at the same time) gave rise to that Iambic of *Naeuvius*,

Fato Romae fiunt Metelli Consules:

And explains that passage in *Cicero*, addressing himself to *Q. Metellus*,
*Nam hoc Verrem dicere aiebant, Te non Fato ut ceteros ex vestra familia, sed opera sua Consulem factum*⁸.

But to return from my Digression, the memorable Tincture, which the Roman Law acquired by this Union, has been the subject of some mirth, with those who never considered how far it spread.

It is not to be denied, that there are some Instances of a very extraordinary nature:

*Testamentum, Testatio Mentis*⁹.

*Mutuum, quod de meo tuum fit*¹.

*Peculium, pusilla pecunia*².

*Possessio, quasi pedis positio*³.

*Donatio, dicta a dono, quasi dono datum*⁴.

*Furtum a Furvo, id est nigro, dictum Labeo ait*⁵.

*Praevaricator. Labeo a varia certatione tractum ait*⁶.

*Falcidia Lex. Λέξις Ρωμαϊκή—ἀπὸ τῆς φάλξ, ὃ δηλοῖ τὴν δρεπάνην*⁷.*

Thus *Labeo Antistius*, of whom we read above,

Soror quae seorsim nascitur.

And *Nigidius*,

*Frater, quasi fere alter*⁸.

Much has been said in alleviation of these unscholarlike Definitions, and I could wish, for the Credit of the Profession, to have seen those Defences more satisfactory.

* *Falcidia. Vox Romana, a Falce, quod verbum significat idem ac δρεπάνην.*

It is urged, that Etymology is one kind of Weapon in the hands of a Philosopher or a Civilian, and another in the hands of a Grammarian⁹.

The *Philosopher* follows the order of Nature, and the train of his own Ideas. He attends to a kind of Philosophical Progress, and draws the line between Abstraction and Concretion. Thus with him *Homo* comes from *Humanitate*, *Sapiens* from *Sapientia*, and yet he is not so injudicious as to imagine it comes from thence Grammatically, for in that Light *Sapientia* rather comes from *Sapiens*. And that is some Justification of *Vlpian*, who has been often called upon to support his Derivation of *Jus* from *Justitia*, whereas *Justitia* is derived from that.

The *Grammarian* on the other hand goes to work another way, and fetches the same *Homo* not from *Humanitate* with the Philosopher, but from *Humo*, in regard to Propriety and Derivation, to the order of Language, and the Deduction of one word from another.

Origo quorundam nominum, id est, unde veniant, non pene omnibus patet. Proinde quaedam noscendi gratia operi interjecimus. Licet origo nominum unde veniat a philosophis eam teneat rationem, ut per denominationem [alii diminutionem] Homo ab Humanitate, Sapiens a Sapientia nominetur, quia prius Sapientia, deinde Sapiens; tamen claret alia specialis in origine quorundam nominum causa, sicut Homo ab Humo, unde proprie est appellatus².

But the most natural Answer is the truest, the easiest, and the best. The Roman Law is not more chargeable with this negligence, than every Profession besides. Who knows not, how *Cicero*³ defines *Fides*, *Jucundum*, *Aequum*, &c? I am contented, when I find among Historians, Churchmen, and Schoolmen, nay Grammarians themselves, who claim perfection in this respect, such Definitions, as follow; which, in tenderness to their Compilers, I produce without quoting my Authorities.

Πατρίκιοι, ὅτι πατέρας εἶχον ἀποδείξαι. * See *Adam's Roman Antiquities* p. 12.
Justitia. *Juris Statio.*
Mentiri. *Contra mentem ire.*
Argumentatio. *Argutae mentis Oratio.*
Herald or Herault, *Herus alter.*
Presbyter, *quasi praebens iter.*
Fines (in Leases and Covenants) *quia liti finem imponunt.*

And many other, where, I am persuaded, neither *Vlpian*, nor *Paulus*; *Tribonian*. nor *Neratius*, were consulted in drawing them up.

* *Patricii, quia patres ciere possent.*

THE PONTIFICAL LAW OF THE ROMANS.

Jac. Gutherius de Vet. Jure Pontificio. Par. 1612. 4.

Alex. ab Alexandro II. Geneal. Dier. 8.

Muelen. ad Pompon. de O. I. pag. 377.—381.

This is a Subject which has been handled by the Ancients themselves, though nothing of that kind is come down to us:

Such among them were,

Ateius Capito.

Labeo Antistius.

*Rutilius Geminus.**

* Gellius, Festus, Charisius, Fulgentius.

WE have seen the general distribution of *Jus* into *Public* and *Private*. The former of which included also the *Jus Sacrum*; and extended itself to all affairs of Religion, in which the Peace and Tranquility of the State had a great Interest.

We have also observed, that in some Distributions, the *Jus Sacrum*, on account of its Importance and Extent, made an Article by itself, and was branched off from the *Jus Publicum*, as a separate head.

And now it may not be improper to add a word or two concerning that *Jus Sacrum*, which we often meet with in the Roman Writers, under the Appellation of *IVS PONTIFICIVM*.

This Law, as we shall see, much resembles the Ecclesiastical Law of the following Ages, in many instances.

So that the Common or Temporal Law of the Romans seems to be called *Jus Legitimum*, the other the *Jus Sacrum* or *Pontificium*.

Et legitimo et pontificio jure quaerat¹.

Ita perturbatis sacris, contaminatis gentibus, et quam deseruisti, et quam polluisti, Jure Quiritium legitimo tutelarum et hereditatum relicto, factus es ejus filius contra fas, cujus per aetatem pater esse potuisti².

¹ Cic. pro Domo. § 14.

² Id. ibid. § 13. 8n.

Pertinet

Pertinet ad ipsam cognitionem vestram: quae cum sit in Jus Religionis, et in Jus Reipublicae distributa, Religionis partem, quae multa est verbosior, praetermittens, de Jure Reipublicae dicam¹.

¹ Id. ibid. § 12.

The Names it goes by, are commonly,

Pontificalis Compositio Juris⁴.

Jus Pontificale⁵.

Jus Pontificium⁶.

Jus Religionis⁷.

⁴ Id. II. de

Legg. 22.

⁵ Id. ibid.

⁶ Id. III. de

Orat. 33.

⁷ Id. pro Domo.

§ 14.

Id. II. de

Legg. 21.

⁷ Id. pro Do-

mo. § 12.

A general View of the Authority of this College may be gathered from the three Authors subjoined.

Pontificem deinde Numam Marcium Marci F. ex patribus legit, eique sacra omnia exscripta exsignataque attribuit, quibus hostiis, quibus diebus, ad quae templa sacra fierent, atque unde in eos sumptus pecunia erogaretur. Cetera quoque omnia publica privataque sacra Pontificis scitis subjecit: ut esset quo consultum plebes veniret: nequid divini Juris, negligendo patrios ritus peregrinosque adsciscendo, turbaretur. Nec caelestes modo ceremonias, sed iussa quoque funebria, placandosque manes ut idem Pontifex edoceret⁸.

⁸ Liv. I. 20.

Omnis Reipublicae dignitatem, omnium salutem, vitam, libertatem, aras, focos, Deos Penates, bona, fortunas, domicilia eorum [Pontificum] sapientiae, fidei potestatique commissa ac credita esse⁹.

⁹ Cic. pro Domo. init.

Εἰσὶ δὲ τῶν ΜΕΓΙΣΤΩΝ ΠΡΑΓΜΑΤΩΝ ΚΥΡΙΟΙ. Καὶ γὰρ δικάζουσι ἔτοι τὰς ἱερὰς δίκας ἀπάσας ἰδιώταις τε καὶ ἄρχεσι, καὶ λειτουργοῖς θεῶν. Καὶ νομοθετοῦσιν ὅσα τῶν ἱερῶν ἀγγραφα ὄντα εἰσὶν ἀνέθιστα. κρίνοντες αὖ ἐν ἐπιτήδεια τυγχάνειν αὐτοῖς φανείη νόμων τε καὶ ἐθισμῶν. Τὰς τε ἄρχας ἀπάσας ὅσας θυσία τε καὶ θεραπεῖα θεῶν ἀνάγκηται, καὶ τὰς ἱερεῖς ἀπάσας ἐξετάζουσιν. Υπηρέτας τε αὐτῶν καὶ λειτουργὰς, οἷς χρῶνται πρὸς τὰ ἱερὰ, ἔτοι φυλάττειν μηδὲν ἐξαμαρτάνειν παρὰ τὰς ἱερὰς νόμους. Τοῖς τε ἰδιώταις ὅποσοι μὴ ἴσασι τὰς περὶ τὰ θεῖα καὶ δαιμόνια σεβασμὸς, ἐξηγῆται γίνονται καὶ προφηταί. Καὶ εἰτινας αἰδῶνται μὴ πειθομένους ταῖς ἐπιταγαῖς αὐτῶν ζημιῶσι, πρὸς ἕκαστον χρῆμα ὀρῶντες. Εἰσὶ τε ἀνυπεύθυνοι πάσης δίκης τε καὶ ζημίας, ἕτε Βυλὴ λόγον ἀποδίδόντες ἕτε Δήμῳ.*

¹ Dion. Halic.

Antiqq. Rom.

l. 2. extrem.

* Res autem maximi momenti sunt penes eos. Etenim hi cognoscunt de omnibus causis ad sacra pertinentibus, et inter privatos, et magistratus, et deorum ministros. Et leges ferunt de sacris quae non sunt scripta, aut quae moribus non sunt recepta: et ipsimet arbitrato sua leges et consuetudines eligunt, quas omnium optimas judicant. Et omnes magistratus, quorum curae sacrificia et deorum cultus est commissus, et omnes sacerdotes examinant. Ipsi etiam cavent, ne quid eorum famuli et ministri, quorum opera in sacris utuntur, contra sacratas leges admittant; privatisque hominibus, qui deorum vel geniorum cultum ignorant, sunt enarratores et interpretes. Et si quos animadvertant suis mandatis non parere, pro cuiusque delicti magnitudine eos mulctant. Ipsi quoque nulli iudicio nullique mulctae sunt obnoxii, neque Senatui, neque Populo rationem reddunt.

K

From

THE PONTIFICAL LAW

From this Account of their general Jurisdiction, we may conclude :
 1. That they determined all Controversies whatsoever in religious Matters, and between whomsoever. 2. That they had a Legislative Authority in appointing Rules and Orders where they saw convenient. 3. That they had a Visitation over all their inferior Officers, and over all those who had any Connection with religious Concerns. 4. That they held a Tribunal over all their Servants and lower Ministers. 5. That they were a standing Council to those who wanted direction in cases of public Worship. 6. That they had a discretionary Power over Offenders, and their Sentence was final and unappealable.

Their Jurisdiction is pretty well marked out in these Words of Tully :

*Quid ad Pontificem de Jure parietum, aut aquarum, aut ullo omnino ?
 Ergo, quod cum Religione conjunctum est. Id autem quantum est ?
 De Sacris, credo, de Votis, de Feriis, de Sepulchris, et siquid ejusmodi est*².

² Cic. II. de Legg. 19.

And I have great reason to think, that they were not ministring Priests, such as the *Rex Sacrorum*, the *Flamines*, the *Sakii*, &c. but a College of Ecclesiastical Judges, if I may be allowed to make use of that term.

That their Office was in great measure *Juridical*, I think is plain from this Passage in *Lampridius*³, in relation to *Alexander Severus*, who, like the rest of the Emperors, was at the head of this Society :

Pontificibus tantum detulit, XV. Viris atque Auguribus, ut quasdam causas Sacrorum a se finitas iterari et aliter distingui pateretur.

*Maximus Pontifex dicitur, quod maximus rerum quae ad sacra et religiones pertinent, Judex sit, vindexque contumaciae privatorum, magistratumque*⁴.

⁴ Festus in v.

It was not singular to the Romans. The Druids, or the old Priests of the Western World, *fere de omnibus controversiis, publicis privatisque, constituebant*; namely, upon Felonies, upon Estates, and Descents⁵. It was so with the A Egyptians⁶, and the Germans⁷.

⁵ Caesar. de B. Gall. VI. 13.

⁶ Aelian. XIV. V. H. 31.

⁷ Tacit. de morib. Germ. c. 7.

⁸ Tacit. I. Hist. 15.

But to descend to their particular Concerns⁸: one of which was

ADOPTION, or rather ARROGATION.

*Si te privatus, lege Curiata, apud Pontifices, ut moris est, adoptarem*⁹ —

*Arrogantur ii, qui cum sui Juris sunt, in alienam sese potestatem tradunt, ejusque rei ipsi Auctores sunt. Sed Arrogationes non temere, nec inexplorate committuntur. Nam Comitia, arbitris etiam Pontificibus, praebentur, quae Curiata appellantur — jusque jurandum a Q. Mucio P. M. conceptum dicitur, quod in arrogando juraretur*⁹.

Nego istam Adoptionem Pontificio Jure esse factam: primum, quod hae vestrae sint aetates, ut is qui Te adoptavit, vel filii Tibi loco
per

⁹ Gell. V. 19. Add. Guther. II. de Jure Pontif. 5.

*per aetatem esse potuerit, vel eo quo fuit: deinde, quod causa quaeri soleat adoptandi, ut et is adoptet, qui, quod natura jam assequi non potest, et Legitimo et Pontificio jure quaerat, et ita adoptet, ut ne quid aut de dignitate generum, aut de sacrorum religione minuatur*¹.

¹ Cic. pro Do. mo. § 14.

*Dixi apud Pontifices, istam Adoptionem nullo decreto hujus Collegii probatam, contra omne Pontificium Jus factam, pro nihilo esse habendam*².

² Id. ibid.

And the reason of this is plain. For the Adopted Person did *transire in gentem et sacra Personae Adoptantis*. As we see from two Instances of Cicero just now cited:

*Nequid aut de dignitate generum, aut de sacrorum religione minuatur*³.

³ Id. ibid.

*Ita perturbatis sacris, contaminatis gentibus — factus es ejus filius, cujus per aetatem pater esse potuisti*⁴.

⁴ Id. ibid. § 13. fin.

For every Family among the Romans had, I will not say, a Religion of their own, but a system of Rites, of Sacrifices, and religious Interests peculiar to themselves.

So Tully in his Book of Laws,

SACRA PRIVATA PERPETVA MANENTO⁵.

Which he comments upon, or illustrates thus:

*De sacris autem, qui locus patet latius, haec sit una sententia, ut conserventur semper, et deinceps familiis prodantur, et, ut in lege posui, perpetua sint Sacra. Hoc uno posito, haec jura Pontificum auctoritate consecuta sunt, ut, ne morte patrisfam. sacrorum memoria occideret, iis essent ea adjuncta, ad quos ejusdem morte pecunia venerit*⁶.

⁵ II de Legg. 9. Add. Heinecc. Antiqq. Rom. T. I. pag. 338. D'Arnaud. II. Var. Conject.

⁶ Cic. II. de Legg. § 19.

Thus Nuptiae is defined by Modestinus⁷.

⁷ D. 23. 2. 1.

Conjunctio Maris et Feminae — divini et humani juris Communicatio.

*Sequuntur Connubia et Affinitates, ex quibus etiam plures propinqui — Sanguinis autem conjunctio benevolentia devincit homines et caritate. Magnum est enim eadem habere monumenta Majorum, iisdem uti sacris sepulchra habere communia*⁸.

⁸ Cic. I. Offic. 17. Add.

DIIS MANIBVS.
L. POLITICIENO P. FIL.
PAPINIANO
AEDITVO SEPV. SERG.
FAMILIAE. AEDITVAVIT.
ANN. XII. VIXIT ANN. XXVII.
M. VI. L. POLITICE
NVS L. F. PHILIPPICVS
SACERDOS SERG. FAM.
FRATRI PISSIMO
FECIT ET SIBI

D. 1. 8. 9. 2.
— 48. 13. 9. 1.
C. 9. 32. 4.
— 5. 4. 20.
— 6. 20. 12.

Romae.

Another

THE PONTIFICIAL LAW

Another Reason might be, and probably was, because several Familys having hereditary Priesthoods annexed to them, it was the care of those, who had the care of Religion, to prevent any abuse that might arise by Adoptions in this particular.

MARRIAGES

belonged to them for the same reason, as We gather from the Definition of *Nuptiae* lately produced².

They assisted therefore at the Ceremony of *Confarreation*, for which *Servius* is quoted:

Farre Nuptiae fiebant per Pontificem Maximum et Flaminem Dialem.

But more especially were they interested in this Transaction, because the Degrees of Consanguinity, and all *Incestae et Indecorae Nuptiae* were of their proper Cognizance.

So *Augustus* married the Wife of *Nero*, at the time She was far gone with Child. *Abducta Neroni uxor, et consulti (per ludibrium) Pontifices, an concepto necdum edito partu rite nuberet*¹.

¹ Tacit. I. Annal. 10.

Thus the Emperor *Antoninus Pius* sent his Rescript, in quality of *Pontifex Maximus*, to the College of *Pontifices*, upon a Question of Legiti-

² D. 38. 16. 3. macy².
ult.

³ D. 38. 10. 4. Some Writers think it plain from two Laws in the Digests³, that the Doctrine of Permitted and Prohibited Degrees was not the proper business of the Civil or Temporal Lawyer, but the immediate concern of the Pontifices: that it was however, what the Temporal Lawyer ought to be acquainted with, as the Cases of Inheritance, of Guardianship, and

⁴ Guther. II. 7. sometimes of Judicial Evidence depended much upon it⁴.

FUNERALS, SEPULCHRES.

*Nec caelestes modo Cerimonias, sed iusta quoque Funebria, placandosque manes ut idem Pontifex edoceret*⁵.

⁵ Liv. I. 20.

*Idque cum multis aliis rebus, tum e Pontificio Jure, et Cerimoniis Sepulchrorum intelligi licet*⁶.

⁶ Cic. I. Tusc. 12.

Thus they appear to have had a Power of assigning a Burying place to those, who had none in their own right.

P. ACTILIO RVFO
ET
ACTILIAE BERONICAE
INDVLG. PONTIF.
LOCVS DATVS⁷.

⁷ Reines. XVII. 1. Fabret. Inscrip. pag. 419.

And could enforce the Execution of last Wills and Testaments relating to Funeral Monuments.

Quamvis

*Quamvis enim stricto Jure nulla teneantur actione heredes ad monumentum faciendum, tamen Principali vel Pontificali auctoritate compelluntur ad obsequium supremæ voluntatis*³.

³ D. 3. 50. 1.

They had indeed the whole Cognizance in Sepulchral matters, at least a concurrence with the Emperor.

*Ossa, quæ ab alio illata sunt, vel corpus, an liceat Domino loci effodire vel eruere sine decreto Pontificum, seu jussu Principis, quaestionis est? Et ait Labeo, expectandum vel permissum Pontificale seu jussionem Principis*⁹.

⁹ D. 11. 7. 8. pr.

*Potentibus quibusdam, ut sibi reliquias suorum, aut propter injuriam vetustatis, aut propter fluminis incursum, aliaque his similia quaecunque secundum exemplum Proconsulum transferre permitterem: quia sciebam in urbe nostra ex ejusmodi causis Collegium Pontificum adiri solere, Te, Domine, maximum Pontificem consulendum putavi, quid observare me velis*¹.

¹ Plin. X. Epist. 73.

OATHS, VOWS, CONSECRATIONS, &c.

*Id votum in hæc verba, praeunte P. Licinio, Pontifice Maximo, Consul nuncupavit*².

² Liv. XXXVI. 2. Add. IX 46.

*Libet jurare. Tun' meo Pontifex perjurio es*³?

³ Plant. Rudens V. 3. 21.

Of Consecrations something may be seen in Cicero's Orations *pro Domo*, and in the Solemnity *Virginis Vestalis capiundæ*, described by *A. Gellius*⁴.

⁴ I. 12.

It appears from hence, that Tully had good reason to say,

*Pontifex nemo bonus nisi qui Jus Civile cognosset*⁵.

⁵ II. de Legg. 19.

And this Union of *Jus Civile* and *Pontificium* is marked out in several passages of his Writings:

*Quid Icti? quid Pontifices? quam multa meminerunt*⁶?

⁶ de Senect. § 7.

*Audivi enim nuper eum studiose et frequenter Sami, cum ex eo Jus nostrum Pontificium, quæ ex parte cum Jure Civili conjunctum esset, vellem cognoscere*⁷.

⁷ in Brut. § 42.

*Hoc magis eas res et memini et expecto, quod et ad Pontificium Jus et ad Civile pertinent*⁸.

⁸ II. de Legg. 18.

So we often find these two Professions united in the same Person:

*Scaevolæ, Pontifices ambo, et iidem Juris peritissimi*⁹.

⁹ Id. ibid. 19. Add. D. 1. 2. 2. 39.

*T. Manlius Torquatus, præter egregia multa raræ dignitatis, Juris quoque Civilis et Sacrorum Pontificalium peritissimus*¹.

¹ Valer. Max. V. 8. 3.

*Hæc fuit P. Crassi illius veteris, hæc T. Coruncanii, hæc proavi generi mei, Scipionis, prudentissimi hominis, Sapientia, qui omnes Pontifices Maximi fuerunt, ut ad eos de omnibus divinis atque humanis rebus referretur*².

² Cic. III. de Orat. 33.

But

THE PONTIFICAL LAW

But we must not omit a particular circumstance, which gave them a great consideration in the Roman Law, and is as follows:

I think it plain from the Genius of the Roman People, whose Sword was a kind of national Profession, that they could spare very few from the Field. And therefore the Attention to all the Arts of Peace, such as their History, the Care of their Annals, Records, and all the species of Civil Polity devolved upon those, who already by their profession did *vacare a Re Militari*: that they might not burden their State with an idle and useless set of People, or what was not intirely necessary.

I am sensible, that part of this Observation is contradicted by a great Authority. With whom we read, that no City at its original Foundation had a greater number of Priests in proportion to the number of their In-

³ Dion. Halic. II. 21.

habitants³. But then this justifies the other part. They could less spare from their Army, if any other Profession was overstocked before.

As to their HISTORY or CHRONOLOGY, the beginning of it was very rude. The Praetor, or some great Officer, at the entrance of every Year, used to drive a Nail into a Wall of the Temple of Jupiter, to mark the new Year by. And this for some time was all their Calendar, and all their Chronology.

⁴ Festus in v.

Clavus Annalis appellabatur, qui figebatur in parietibus sacrarum Aedium per annos singulos, ut per eos numerus colligeretur annorum⁴.

Lex fuit vetusta — ut qui Praetor Maximus sit, Idibus Septembribus clavum pangat. Fixus fuit dextro lateri Aedis Jovis O.M. — Eum clavum, quia rarae per ea tempora literae erant, notam numeri annorum fuisse ferunt⁵.

⁵ Liv. VII. 3.

⁶ Cic. V. ad Attic. 15. Add. Perizon. Animadvers. Hist. Lib. V. pag. 180, 181.

Ex hoc die clavum Anni movebis⁶.

Their History afterwards improved a little. An exact, but jejune, Register was kept of Events, as they fell out, written with no ornament of Style or Composition. Which was all the History they had for a considerable space of time. And these Records, such as they were, were the work of their Priests, their Pontifices, and always preserved in that College.

Erat Historia nihil aliud, nisi Annalium Confectio: cujus rei memoriaeque publicae retinendae causa, res omnes singulorum annorum mandabat literis Pontifex Maximus, efferebatque in album, et proponebat tabulam domi, potestas ut esset populo cognoscendi: ii, qui etiam nunc Annales Maximi nominantur⁷.

⁷ Cic. II. de Orat. 12.

And these *Annales Maximi*, according to Festus, were so called *non a magnitudine, sed quod pontifex Max. consecrasset*, or perhaps *conscripti*.

Tabulam dealbatam quotannis P. M. habuit, in qua, praescriptis Consulium nominibus, et aliorum Magistratuum digna memoratu notare con-

*consueverat, domi militiaeque terra marique gesta, per singulos dies
cujus diligentiae annuos commentarios in octoginta libros Veteres re-
tulerunt, eosque a Pontificibus Maximis, a quibus fiebant, Annales
Maximos appellarunt*⁸.

⁸ Servius ad
Virg. l. Aen.
377.

*Epos Latinum primus digne scripsit is, qui res Romanorum XIIIX. com-
plexus est libris, qui et Annales inscribuntur, quod singulorum fere
annorum actus contineant, sicut publici Annales, quos Pontifices, Scri-
baeque conficiunt de Romanis, quod Romanorum res gestas declarant*⁹.

⁹ Diomed. l. 3.
apud Putsch.
col. 485.

*Quod post excessum Romuli novello adhuc Romanae urbis imperio factum,
Pontifices, penes quos scribendae historiae potestas fuit, in literas re-
tulerunt*¹.

¹ Vopiscus in
Tacit. init.

*Plurima est et in omni Jure Civili, et in Pontificum libris, et in XII.
Tabb. Antiquitatis effigies, quod et verborum prisca Vetustas cog-
noscitur*².

² Cic. l. de O-
rat. 43.

*Sic fautor Veterum, ut Tabulas peccare vetantes,
Quas bis quinque Viri sanxerunt, foedera Regum
Vel Gabius, vel cum rigidis aequata Sabinis,
Pontificum libros, annosa volumina Vatum,
Dicitur Albano Musas in monte locutas*³.

³ Hor. 2 E-
pist. l. 23.

Their History itself, when it came to be set forward, was but rude and unadorned. The Writings of *Portius Cato*, and the first Roman Historians, according to a good Judge in this matter⁴, were *Ελληνικαῖς χρονολογίαις ἐοικυῖαι*, like those *Chronological Tables of the Greeks*, of which He immediately subjoins no very favourable account, when He tells us, that they were *μονοειδῆς, καὶ ταχὺ προσισάμεναι τοῖς ἀκέραις*, very simple, and very disgusting.

⁴ Dion. Halic.
l. 1. Praef.
extr.

And, if such was their History, what must their Annals have been, that preceded?

From what we have seen of these Pontifical Records, and their natural Jejuneness, I wonder that any Writer upon *Tully* should hesitate a moment upon that passage at the beginning of his first Book *de Legibus*,

Annales Pontificum Maximorum, quibus nihil potest esse jucundius, and not admit either of nudius according to some, or jejuni with others; especially when the same Writer adds, Quoniam sic scripta sunt ut ne legantur quidem. So *Ovid*:

*Sumpserit Annales: nihil est hirsutius illis*⁵.

⁵ Il. Trist.
259.

And yet some People have rigorously maintained the received Reading.

In consequence of their care over the History of their Country, the Regulation of the CALENDAR belonged to them likewise. And it was in virtue of this character, viz. PONTIFEX MAXIMVS, that *Julius Caesar* made a considerable alteration in it. For which service He had the honour of giving his name to one of the Roman Months.

Ab

THE PONTIFICAL LAW

⁵ Varro apud
Præcian. l. 4.

*Ab illo honoris et virtutum causa, qui Fastos porrexit (or perhaps corrected) Julius Mensis appellatus est*⁵.

And this Reading I prefer the rather, because Suetonius, who relates this occurrence, writes so also :

⁶ in Jul. § 40.

*Conversus hinc ad ordinandum Reip. statum, Fastos correxit, jampridem vitio Pontificum per intercalandi licentiam adeo turbatos, ut neque messium feriae aestati, neque vindemiarum autumnino competerent*⁶.

From the care of the Calendar, it follows, that the *Dies Legitimi, Dies Fasti et Nefasti*, the TERM DAYS, were to be learned from them :

⁷ Cic. pro
Muren. § 11.

*Possit agi lege necne, pauci quondam sciebant : Fastos enim vulgo non habebant. Erant enim in magna potentia, qui consulebantur, a quibus etiam dies, tanquam a Chaldaeis, petebantur*⁷.

Indeed not only the *Days* of impleading, but the *Methods, Rules* and *Circumstances* of it also were with them :

⁸ D. 1. 2. 2. 6.

*Omnium harum et interpretandi Scientia, et Actiones apud Collegium Pontificum erant, ex quibus constituebatur, quis quoquo anno praeesset privatis*⁸.

The meaning of which I take to be, that as *the Register of Writs*, as I may call it, and other *Methods of Practice* were in the custody of this Body, one of their Number was commissioned yearly, as long as this method lasted, to attend the Common Law or Temporal Courts (*praeesset privatis*) in order to direct the Process.

⁹ Id. ibid.

These *Actiones Legis* were the *Forms* or *Methods* of conducting the judicial Proceedings of an Action at Law, *quibus inter se homines disceptarent*⁹.

¹ Cic. pro Q.
Roscio, § 8.

² Id. de Orat. 55.

*Sunt Jura, sunt Formulae de omnibus rebus constitutae, ne quis aut in genere injuriae aut in ratione actionis errare possit : expressae sunt enim ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicae a Praetore Formulae ad quas privata lis accommodatur*¹.

³ Pro Muren.
§ 11.

⁴ Id. II. de
Invent. 19.

Cicero², speaking in derogation of the common Lawyer, calls him *Formularum cautores*. The same Writer also, in the same strain of Ridicule, has given us an instance³ of these *Actiones* which we are describing. It is the Process upon joining Issue. Where it was not sufficient for one to challenge, and the other to deny, but it was required to be done in a precise *Form* of words, where the least variation was fatal⁴. And the Judge too had his *Form* to pronounce by. The Passage is worth consulting, though it is probable, considering the topic he was engaged in, the Ridicule might be exaggerated.

Many

Many of these Forms may be seen, as they are collected by *Brissotius*⁵ *De Formul*
and *Sigonius*⁶. Several of them are preserved in *Festus*, and other Writ-
ers of Antiquity: in the Digests, &c. They were generally known and
quoted by the first words of the Writ, agreeably to what we have
observed above⁷.

So *Vlpian*,

*Hoc interdictum appellatur QVORVM BONORVM*⁸.

*Hoc Interdictum vulgo QVOD LEGATORVM appellatur*⁹.

I cannot omit that remarkable Form of pronouncing sentence in a ca-
pital case:

*PARVM CAVISSE VIDERI pronunciat Magistratus, cum de Consilii
sententia capitis quem condemnaturus est*¹.

So the Sentence ran of *Lollius Urbicus* in *Apul. Apolog. TESTAMENTVM
VERVM VIDERI ET RATVM ESSE DEBERE*².

But to return: about the year of the City 449, *Cn. Flavius*, the Scribe
of *Appius Claudius*, got a copy of this Record, and made it public.

*Civile Jus repositum in penetralibus Pontificum evulgavit, Fastosque
circa forum in Albo proposuit, ut, quomodo lege agi posset, sciretur*³.

*Inventus est Scriba quidam, Cn. Flavius, qui cornicum oculos confixerit,
et singulis diebus ediscendos Fastos populo proposuerit, et ab ipsis cau-
tis Jureconsultis eorum sapientiam compilarit*⁴.

*Quid ergo profecit [Flavius] quod protulit Fastos? Occultatam putant
quodam tempore istam tabulam, ut Dies agendi peterentur a paucis.
Nec vero pauci sunt auctores, Cn. Flavium, Scribam, Fastos protu-
lisse, actionesque composuisse*⁵.

And this gave rise to what was called the *Jus Civile Flavianum*. To
which the *Jus Aelianum* was an Addition or Supplement.

*Postea cum Appius Claudius proposuisset, et ad formam redeuisset has
actiones, Cnaeus Flavius, Scriba ejus — subreptum librum populo
tradidit. — Hic liber, qui actiones continet, appellatur Jus Civile
Flavianum. — Non post multum temporis spatium, Sex. Aelius alias
actiones composuit, et librum populo dedit, qui appellatur Jus
Aelianum*⁶.

Thus have I gone through a detail of their Jurisdiction, and given a
general View of the *Jus Sacrum* of the Romans, in conformity to that
sketch of it, that was struck out by *Tully* in a passage lately cited⁷.

Only it must be added, that the Power of Life and Death, as in the
case of Incestuous Vestals⁸, was with them also; and that they seem to
have been Judges of the Extent of their own Jurisdiction.

*Senatus Pontificum Collegium consuli jussit, num omne id aurum in ludos
consumi necessum esset. Quum Pontifices negassent, ad Religionem
pertinere, quanta impensa in ludos fieret*⁹.

⁵ De Formul
lis Mogunt.
1694. 4.

⁶ I. de Judic.
10.

⁷ pag. 25.

⁸ D. 43. 2. 1.

⁹ D. 43. 3. 1.
pr.

¹ Festus, pag.
325.

² Add. Cujac.
III. Observ.
26. Gotho-
fred. ad D. 3.

³ Liv. IX. 46.

⁴ Cic. pro
Muren. § 12.

⁵ Cic. VI. ad
Attic. 1. Add.
D. 1. 2. 2. 6, 7.

Bynkershoek
and other
Commenta-
tors upon
that place of
Pomponius.
Valer. Max.
II. 5. 2.
Plin. XXXIII.

⁶ D. 1. 2. 2. 7.

⁷ II. de Legg.

⁸ 19.

⁹ Guther. II.
2.

⁹ Liv. XXXIX.

THE PONTIFICAL LAW &c.

Onuphrius Panvinus has collected a series of the PONTIFICES MAXIMI, the supreme Magistrates, who presided over this Body, from *Numa Marcius*, the first of them, down to the Emperor *Vespasian*.

It was an Office of great power, and therefore not to be neglected by those who had any Designs upon their Country. And accordingly we find *Julius* invested with it, as we have shewn above. He was succeeded by *Lepidus*, one of the famous Triumvirate². After whose Death *Octavian* assumed it:

² Paterc. II. 63.

*Postquam Pontificatum Maximum, quem nunquam vivo Lepido auferre sustinuerat, mortuo demum suscepit*¹

¹ Sueton. In August. § 31.

*Per multos annos tulit [Lepidum] ornamenta Principis retinentem: et Pontificatum Maximum, non nisi mortuo illo, transferri in se passus est*².

² Senec. I. de Clement. 10. Add. Dion Cassius, XLIX. 15.

For now the Emperors, in order to become absolute, engrossed every species of Authority, and were compounded of all kinds of Magistracies.

*[Augustus] posito Triumviri nomine, Consulem se ferens, et adtuendam plebem tribunicio jure contentum, ubi militem donis, populum annona, cunctos dulcedine oculi pellexit, insurgere paulatim, munia Senatus, Magistratum, Legum in se trahere*³.

³ Tacit. I. Annal. 2. init.

And so this Dignity continued annexed to the Imperial Titles.

It was maintained by the Christian Emperors as far as *GRATIAN*, who laid it aside by a decree⁴.

⁴ Zosimus, lib. 4.

Therefore PONT. MAX. in an Inscription of *Justinus Senior*⁵, is PONTIFEX, not PONTIFEX contrary to what *Van Dale*⁶ imagined⁷.

⁵ Gruter. CLXIV. 5. ⁶ Dissert. de Orac. pag. 155.

In Medals and Inscriptions, this Title always stands at the head of their Honors, Offices, and Magistracies as may be seen from many instances in the II^d and III^d Class of Inscriptions in *Reinesius*. So in *Gruter*⁸:

⁷ Liebe Gotha Nummaria, pag. 36. Casaub. ad Sueton. in Octav. § 3. More particularly, Spanheim. Dissert. XII. § 4. and Campian. de Magistr. Rom. p. 19—23. ⁸ IV. 22. 6.

IMP. CAESAR
DIVI FILIVS
PONTIFEX MAXIMVS
IMP. XII. CONS. XI.
TRIB. POT. XIV.

And in many other Remains, with the utmost uniformity.

JUSTICE.

JUSTICE.

Inst. Lib. I. Tit. 1.

Dig. Lib. I. Tit. 1.

and the Commentators.

Harprecht de Justitia et Jure. Tubing. 1613. 8.

Grotius B. I. C. 1.

Pufendorf. B. I. C. 7.

Noodt. III. Probab. 1, 2.

JUSTICE is that Virtue of the human Mind, by which we are disposed to render to every Man what is due to him.

*Justitia est constans et perpetua Voluntas Jus suum cuique tribuendi*¹.

*Justitia suum cuique tribuit*².

*In suo cuique tribuendo cernitur*³.

*Affectio suum cuique tribuens*⁴.

*Habitus Animi, communi utilitate conservata, suam cuique tribuens dignitatem*⁵.

*Aequitas, jus unicuique tribuens, pro dignitate cujusque*⁶.

*Justitiae munus—in hominum societate tuenda tribuendoque suum cuique, et rerum contractarum fide*⁷.

*Justitia est Habitus Animi ita informatus, ut omnibus rebus tribuat dignitatem*⁸.

*Servat unicuique quod suum est*⁹.

*Probo hanc esse Justitiam, quae suum cuique ita tribuit, ut non distra- batur ab ullius personae justiore repetitione*¹⁰.

*Vnam quidem esse omnium perfectissimam virtutem arbitrandum est ho- minibus, quae Jura omnibus distribuit. Haec est ex causa cogno- minata Justitia*¹¹.

And it is observed by Tully, that from this very principle *suum cuique tribuendi*, which we see enters into all their Definitions, Law or Νόμος, had its appellation among the Greeks:

*Itaque arbitrantur Prudentiam esse Legem, cujus ea Vis sit, ut recte facere jubeat, vetet delinquere; eamque rem illi Graeco putant no- mine a suum cuique tribuendo appellatam: ego nostro a legendo. Nam ut illi Aequitatis, sic nos Delectus vim in Lege ponimus, et proprium tamen utrumque Legis est*¹².

L 2

But ¹ Cic. I. de Legg. 6.

¹ D. 1. 1. 10.

J. 1. 1. pr.

² Cic. III. de

N. D. 15.

³ Id. V. de

Fin. 23.

⁴ Id. ibid.

⁵ Id. II. de

Invent. 53.

⁶ Id. III. ad

Heren. 2.

⁷ Id. I. de Of-

fic. 5.

⁸ Victorin. in

Cicer. de In-

vent.

⁹ Macrob. I.

Saturn. 10.

¹⁰ D. 16. 3. 31.

¹¹

But to understand these Definitions, and to come at a true Idea of Justice, it must be considered, when we talk of giving every Man his *Right*, that of *Rights* some may be called *Perfect*, others *Imperfect*.

Rights are called *Perfect* or *Imperfect*, in conformity to the Degree and Weight of the Obligation, that is laid upon us to enforce their practice.

I. The lowest Exercise of this Principle of Justice, and consequently the strictest Obligation upon us to render it, is that Duty of *Alterum ne laedas*. We are not to make another Man's Condition worse, or interrupt his Happiness by any attack upon his Person, Name, or Fortunes.

* Senec. Epist.
95.

*Quantulum est ei non nocere, cui debeas prodesse** ?

As the Breach of this Rule would be an Outrage that falls within the cognizance of Law, which is to provide for the Peace of that Society we live under, there is in all Systems a Provision of Punishment to restrain or coerce such Enormities.

(And that is effected either by striking upon our Fears, and holding out the Threats of some Inconveniencies which are to attend the Transgression, in order to prevent it; or by putting them in execution upon the Commission of it. The three great Ends of this are, 1. To correct the Offender, and bring him to a better mind. 2. To make some amends to the Party injured; and 3. To display an Example for the better Conduct of others, who are not immediately concerned.)

This is a kind of *natural Compact*. It is a *Contract* which Nature has contrived for, antecedently to any Stipulation of our own. The Equality of our Natures requires an Equality in our dealings with one another; and we are not to subject our Neighbour to any disagreeable Situation, in which we would not be pleased to see ourselves circumstanced. The Relation which is between one Man and another, and the great system of Providence which has wove us into this Texture, has furnished us with these mutual Obligations, to which we are subject by the very Nature of our Being.

And it is to be observed, that one Branch of Justice is called by *Aristotle* *Διορθωτική*, or *Corrective Justice*, because it corrects or sets right the *Inequality* of Injustice.

Thus when a Person detains my Right, there subsists an Inequality in prejudice of me the true Proprietor: an Inequality, which it is the Office of Justice to set straight.

II. Next to these, which I call, perhaps somewhat improperly, *Natural Contracts*, there are *Voluntary Ones*, or some of our own forming. It is the business of these, as well as those, to furnish out an Equality, and it is the business of Justice to support it. Thus the Contract of buying and selling is supposed to be for the mutual and *equal* Emolument of Buyer and Seller. These lay the Foundation of Commerce, and Obligations, and constitute

constitute that great variety of reciprocal Transactions, by which one Man may stand engaged to another.

These are called *Civil Contracts* or Obligations. And a particular Process of Law, somewhat different from the former, is provided to enforce their Execution.

But the Duties owing from Man to Man rest not here: We are not only required to abstain from hurting our Neighbour, from prejudicing him in his just Rights and Demands, from destroying that Ballance, which Nature, Law, or Contract, may have set up; but we are under some kind of Obligation of doing him some positive good Offices, of which there are several Steps or Gradations. For instance,

III. There is a Duty of Obligation of returning a Favour we may have received, to the best of our Abilities. This is the Idea of Gratitude, and the warm Memory of gracious, but uncovenanted, acts of Kindness. That there is an Obligation in this, all People confess; of what kind or degree, we shall see hereafter. To go one step higher;

IV. It is the Duty of every Man, and there lies an Obligation upon him, though still fainter than the last, to exercise his good Offices, even when unchallenged by Compact, or unprovoked by any previous Favour on the other side. And this, if it be of no Detriment to his own Circumstances, is called the Tye or Obligation of *Humanity*.

Omnia communia hominum videntur ea, quae sunt generis ejus quod ab Ennio positum in una re, transferri in multas potest.

Homo, qui erranti comiter monstrat viam,

Quasi lumen de suo lumine accendat, facit:

Nilominus ipsi luceat, quum illi accenderit.

Vna ex re satis praecipitur, ut quidquid sine detrimento possit commodari, id tribuatur vel ignoto. Ex quo sunt illa communia: non prohibere aquam profluentem: pati ab igne ignem capere, si quis velit: consilium fidele deliberanti dare: quae sunt iis utilia, qui accipiunt, danti non molesta.

⁵ Cic. I. de Offic. 16.

Or if it be attended with some little Diminution of his Ease or Interest, it is then

V. That Duty or Obligation, which we are under, to produce upon proper occasions, that Generosity of Temper, which consists in the noble and unconstrained Acts of *Beneficence* and *Liberality*.

*Τὴν χρηστότητα τῆς δικαιοσύνης πλατύτερον τόπον ἐπιλαμβάνουσιν.**

Quanto latius patet Officiorum quam Juris Regula? Quam multa Pietas, Liberalitas, Hummanitas, Justitia, Fides exigunt, quae omnia extra publicas Tabulas sunt?

⁶ Plutarch. in Catone Mai.

Voluntatis et Officii magis quam Necessitatis.

⁷ Senec. II. de Ira. 27.

Multa legem non habent, nec actionem: ad quae consuetudo vitae humanae, lege omni valentior, dat aditum. Nulla Lex jubet amicorum secreta non eloqui, nulla Lex fidem etiam inimico praestare. Quae Lex ad id praestandum nos quod alicui promissimus, alligat?

⁸ D. 13. 6. 17. 3.

⁹ Senec. V. de Benef. 21.

* *Benignitatem latiorē locum occupantem quam Justitiam.*

From this Sketch of Duty, and this Scale of Obligation, many things will arise to direct us right in contemplating the Idea of Justice, and will help us to entertain a true apprehension of it.

1. It is not the Intent, nor indeed is it in the Power, of Human Laws, to make good Men, but good Subjects. They do not mean to form the inward Principle, but correct the outward Excess. Therefore the Breaches of some of those Duties mentioned above, are restrained by Law, and some are not. That is, in other words, Though there be an Obligation upon us for the Performance of each of these Duties, yet Law has not given the same Edge to every species of this Obligation, but to some has added Coercion, to others has given none.

2. Therefore there are some Rights which we may assert by Force: some Duties, of which we may compell the Execution: and there are some, which we can not.

3. As those Laws are called *Perfect*, which are enforced with a penal Sanction, and those *Imperfect*, or less perfect, which have none: so those *Rights*, or *Dues*, of which we can enforce the Execution, or not, are in conformity, called *Perfect* or *Imperfect*.

4. This Compulsion is exerted by different ways, in different circumstances of Life: by *War*, between two independent States or People; and between two Parties living under one Civil Community, by, what comes in the place of War, a Process at *Law*. Thus with the Romans, *bellum, certamen, pugnam, tela, manum conferere*, was translated from the *Camp* to the *Forum*. *Inde ego te ex Jure manu confertum voco*^o. And so with us perhaps, a Man is said to *Wage Law*.

5. To apply this Compulsion, where the Law does not admit of the application, is both absurd and unjust. Thus he, who has done a Kindness, has no Right to exact, though he has to expect, a Return. Otherwise it would be a Bargain, not a Kindness:

^o Cic. pro
Muren. § 12.

¹ Senec. I. de
Benefic. 2.

² Id. III. de
Benef. 7.

³ Strabo l. 14.
fin.

⁴ de Benef.
III. 6.

*Nemo beneficia in Kalendario scribit*¹.

*Primum omnium, pars optima Beneficii perit, si Actio, sicut certae pecuniae, aut ex conducto et locato datur.—Si appello, si ad Judicem voco, incipit non Beneficium esse, sed Creditum. Deinde, cum res honestissima sit, referre gratiam, desinit esse honesta, si necessaria est*².

And in the same manner, the War was unjust, which the Romans waged against the King of Cyprus for Ingratitude³.

This is possibly what *Seneca* alludes to, though he differs in his Nation. *Nostri Majores, maximi scil. viri, ab hostibus tantum res repetierunt: beneficia magno animo dabant, magno perdebant. Excepta Macedonum gente, non est in ulla data adversus ingratum Actio*⁴.

This Passage has also been understood. *Ingratitude is punished in no Country, except in Macedonia.*

6. Some Rights are so near the Centre of the Scale, that it is almost impossible to ascertain, which Side of the Beam they appertain to. Thus Ingratitude, among the Persians was punishable, with others not:

Δικα-

Δικάζουσι δὲ καὶ ἐγκλήμασι, ὧς ἕνεκα ἄνθρωποι μισοῦσι μὴ ἀλλήλους μάλιστα,
δικάζονται δὲ ἡκιστα, ἀχαριστίας.*

Both Greeks and Romans had something like this in the case of the
Ingrati Liberti.

Thus the Duties of *Humanity* had some degree of Compulsion annexed
to them in the Athenian Constitution :

ἀγνοῶς ἐν ταῖς Ἀραῖς
Ὅτι ἔσιν, εἴ τις μὴ φράσῃ ὀρθῶς ὁδὸν,
Μὴ πῦρ ἐναύσει.†

Quid enim est aliud, Erranti viam non monstrare, quod Athenis Exsecrationibus publicis sancitum est?

If that wise People could punish the *Want of Humanity*, (though the passages above rather shew that they took what prudent methods they could to prevent it, by making it odious and detestable) it is less to be wondered at, that they should contrive a Penalty for the external and *positive Acts of Inhumanity*. So *Plutarch* informs us :

Τῷ ζῶντι τὸν κρὶν ἐκδείραντι δίκην ἐπέθηκαν.‡

7. All these Duties are fairly called just, though not equally obligatory. Justice is predicable of them all. For we say it is *just* or *right* to return Favors, to be Charitable, Liberal, &c.

8. Although the person, who stands indebted to me by the *Jus Imperfectum*, acts against *Jus* by not conferring that Due, yet there is no Relief left or given me to come at it.

9. What is due to me by strict Right, or *vinculo Juris*, though in another Man's Possession, is properly said to be *Meum*, or *in meis Bonis*. Thus a Man leaves his Debts by Will, to as full Purposes, as he does his Estate or his Goods. Thus Debts pass in payment; I can assign over a Bond, in payment of so much real Value.

10. I cannot look upon those things in the same light, which are due to me imperfectly. I cannot call those things *in meo Patrimonio*, which depend *alieno Pudore*. What is due to me, not *vinculo Juris*, but *Officii* or *Humanitatis*, such as Liberality, Charity, Gratitude, &c. cannot be demanded as a Debt, nor can I recover it by Law, nor will it pass in Payment. I am only possessed of an Aptness or Fitness to receive what is really due to my Condition, Character or Circumstances, but not a Right to sue it.

* *Ac judicium de eo quoque exercent crimine, cujus causa homines quam maxime quidem se invicem oderunt, in jus vero minime vocant, scilicet ingratitude.*

† ——— *Nescisne inter diras
Hoc esse, si quis iter non recte monstraverit,
Neque lumen accendat.*

‡ *Et qui vivum arietem excoriavit multam imponebant.*

⁵ Xenoph.
K. II. lib. 1.
pag. 10. Ed.
Hutchinsf.

⁶ Diphil. apud
Athen. VI. 9.

⁷ Cic. III.
Offic. 13.

⁸ de Esu Carn.
Orat. I. fin.

J U S T I C E.

11. As long as what is really Mine *stricto Jure*, is detained from me, so long there is a void, or *Lacuna*, in my Property. And the Person who returns it, does not convey to me any new Acquisition, but only does *Lacunam explere*, or fill up the Void which was open.

12. and Lastly, If one conveys to another what was due *ex Jure imperfecto*, he does actually *attribute* or consign to him something which he could not before *properly* call his own.

Thus are we come at the best Apprehension of *Justice*, which is the Execution of all these Duties respectively, according to the proportion of the Obligation, and is therefore by *Grotius* divided into *Justitia Expletrix*, and *Attributrix*.

As when I restore *Commodatum* or *Depositum*, pay my Debts, or deliver a thing sold; when I fulfil the Laws of Contract in any shape; I act *secundum Justitiam Explettricem*.

When I relieve a Man in proportion to his real Necessities, or requite a Favour in consequence of an Obligation; when the State prefers a Man in regard to his Abilities; all these are the unconstrained, but just, Acts of *Attributive Justice*.

So that, properly and accurately speaking, the Object of perfect Right of just Title, and of Expletive Justice is

SUUM,

Or one's Own.

Of imperfect Right, of Fitness, Worth, or Attributive Justice,

MERITUM,

Or what ought to be so.

I have been the longer in supporting and explaining this Distinction, not only, because it is the best, that is given, of Justice, but because it will save us the trouble of all the rest, with which the Consideration of Justice has been unmeasurably and unreasonably clogged; and of which the bare mention may be sufficient. Justice then has been divided into

Universal and Particular,

Commutative and Distributive,

Rectorial and Equatorial,

Moral and Political?

* Aristot.
Ethic. lib. 5.
Grotius, I. 1.
Pufendorf,
I. 7.
Noodt. Com-
ment. ad Tit.
D. de J. et J.

There is not one of these Divisions, but has, in it's turn, been exploded by one Writer or another.

The Distinction of *Universal* and *Particular* Justice was led up by *Aristotle*, in conformity to the philosophical System of the Ancients, who though they distributed Morality into four Species, which they called the Cardinal Virtues, yet frequently resolved the whole of it into the Idea of Justice only, as appears by the well-known Hexameter:

J U S T I C E.

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Εν δὲ Δικαιοσύνῃ συλλήβδην πᾶσ' ἀρετῇς.*

*Justitia, in qua Virtutis splendor est maximus, ex qua boni Viri nominantur*⁹.

*Justitia, ex qua una Virtute Viri boni appellantur*¹.

*Domina et Regina Virtutum*².

*Justitia erga Deos, Religio; erga Parentes, Pietas; vulgo autem, Bonitas; creditis in rebus, Fides; in moderatione animadvertendi, Lenitas; Amicitia in benevolentia nominatur*³.

*Justitia est, servare unicuique quod suum est. De Justitia veniunt Innocentia, Amicitia, Concordia, Pietas, Religio, Affectus, Humanitas*⁴.

So *Aristotle* calls it κατὰ τὴν τῶν ἀρετῶν, and τελείαν μάλιστα ἀρετὴν⁵.*

The *Universal Justice* therefore of *Aristotle* and his Followers, is the compleat Execution of all moral Duties whatsoever: and *Particular*, that which respects our private Contracts, and Transactions with one another.

By the One he means little else than Virtue in general: by the Other that same Virtue applied to Society, and which maintains the Equality we have been lately speaking of; and may not unfitly be called, as it is drafted off from the other for this particular Purpose, a kind of *Political* or *Civil Justice*.

But how unphilosophical this Division! Division is properly a Distribution of things into several Species, which belong to one Common Genus. His Division is a Division of Justice into *Genus* and *Species*, or a Distribution of a Thing into the *Whole*, and a *Part* of the Whole. Something like what we find condemned in *Tully*:

*Si Deliberatio et Demonstratio genera sunt causarum, non possunt recte partes alicujus generis causae putari. Eadem enim res alii Genus esse, alii Pars potest, eidem Genus esse et Pars non potest*⁶.

* In *Justitia* omnis omnino Virtus comprehenditur.

† Virtutum praestantissimam, et maxime perfectam.

⁸ Theogn.

⁹ Cic. I. Offic.

7.

¹ Id. ibid. II.

11.

² Id. III. 6.

³ Id. Orat. partit. 22.

⁴ Macrob. I. in Somn.

Scip. 8.

⁵ V. Ethic. 3.

⁶ Cic. I. de Invent. 9.

M

EQUITY.

EQUITY.

M. Freheri Sulpicius, sive de Aequitate Commentarius.
Ottonis Thes. J. R. Tom. IV.

G. Marani Comment. de Aequitate et Jure. Tolos. 1628. Fol.

H. Grotius de Aequitate, Indulgentia, &c.

Gothofred. ad l. 90. D. de R. J.

———— *ad l. 8. C. de Judic.*

BESIDES the Administration of Justice, some regard must be had to the consideration of Equity: of which the Writers above may be consulted at leisure.

Equity, though not enumerated among the several species of Law, either by

Papinian, D. 1. 1. 7. pr.

Pomponius, D. 1. 2. 2. 12.

or lastly, by

The Emperor himself, *J. 1. 2. 3.*

has yet found a place in *Tully*, whose words are these:

*Jus Civile est quod in Legibus, SCtis, Rebus Judicatis, Jurisperitorum auctoritate, Edictis Magistratum, More, Aequitate, consistit*⁴.

⁴ Topic. § 5.

*Jus constat ex his partibus, Natura, Lege, Consuetudine, Judicato, Aequo et Bono, Pacto*⁵.

⁵ II. ad Heren. 13.

The great Difficulty in the Contemplation of Equity is, to distinguish between that Equity, which is required in all Law whatsoever, and which makes a very important and a very necessary Branch of the *Jus scriptum* or *legitimum*; and that Equity, which is opposed to written and positive Law, and stands in contradistinction to it.

Of the former acceptation of the word *Aequitas*, we have many instances:

⁶ D. 50. 17. 90.

*In omnibus quidem, maxime tamen in Jure, Aequitas spectanda est*⁶.

So *Celsus*,

⁷ D. 1. 1. 1. pr.

*Jus est Ars Boni et Aequi*⁷.

And *Cicero*,

*Jus Civile est Aequitas constituta iis, qui sunt ejusdem Civitatis, ad res suas obtinendas*⁸.

⁸ Topic. § 2.

*Ex Aequo et Bono Jus constat, quod ad veritatem et utilitatem communem videtur pertinere*⁹.

⁹ II. ad Heren. 13.

E Q U I T Y.

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Justitia est Aequitas, ius unicuique tribuens pro dignitate cujusque ¹.

¹ III. ad
Heren. 2.

And, on the other hand, we have instances as frequent, where it stands
opposed to Law and Justice :

*Nulla Juris Ratio aut Aequitatis Benignitas patitur, ut quae salubri-
ter pro utilitate hominum introducuntur, ea nos duriore interpreta-
tione contra ipsorum commodum producamus ad severitatem* ².

² D. 1. 3. 25.

*Inter Aequitatem Jusque interpositam Interpretationem nobis solis et
oportet et licet inspicere* ³.

³ C. 1. 14. 1.

Neque Juris neque Aequitatis Ratio permittit ⁴.

⁴ C. 2. 1. 4.

Praestantissima inter homines bona sunt, Justitia et Benignitas ⁵.

⁵ Nov. 163. pr.

*Placuit in omnibus rebus, praecipuam esse Justitiae Aequitatisque quam
stricti Juris rationem* ⁶.

⁶ C. 3. 1. 8.

*Non magis Juris consultus, quam Justitiae esset. Itaque quae profi-
ciscebantur a legibus et a Jure Civili, semper ad facilitatem Aequi-
tatemque referebat* ⁷.

⁷ Cic. IX.
Philip. 5.

*Si verbis et literis, et, ut dici solet, summo Jure contenditur, solent
ejusmodi iniquitati, nomen Boni et Aequi dignitatemque opponere* ⁸.

⁸ Id. pro
Caecin. § 23.

*Justum secundum Leges aliqua ratione constructum: Aequum juxta
Naturam accipiunt* ⁹.

⁹ Serv. ad
Virg. II.
Aen. 426.

*Inter Jus et Aequitatem hoc interest, ut Jus sit, quod omnia recta et
inflexibilia exigit, Aequitas, quae de Jure multum remittit* ¹.

¹ Donat. ad
Ter. Adolph.
I. 1. 27.

And lastly, *Virgil* ² :

² II. Aen. 426.

———*cadit et Ripheus, justissimus unus,
Qui fuit in Teucris, et servantissimus Aequi.*

So among the *Greeks* :

Τὸ ΑΚΡΙΒΟΔΙΚΑΙΟΝ and τὸ ΕΠΙΕΙΚΕΣ.

For the better understanding this, it will be proper to observe, that the
word *Equity* being of a twofold signification, is either taken *at large*, or
in general, for that natural Justice, which distributes Right to all Men
indiscriminately, without regard to Persons, and which is or ought to be,
the Spirit of all Law whatsoever :

Or it is taken more contractedly, and distinctly, for That Justice, which
takes off from the Rigour and Severity of the written Law, supplying,
by a fair and reasonable Interpretation, what the Lawgiver must be under-
stood to have intended himself, but was *not able*, or did *not think proper*,
to express.

The second of these is more properly our Concern at present, and may
be best understood, by enlarging my account of it, when I said it was

A Supplement of a defective Law, deciding according to the Will or supposed Intention of the Lawgiver, which he was either *not able*, or *not willing*, to express.

For all Equity consists either

1. In *extending* the words of the Law to similar, but not express, Cases,

Vbi Lex minus scripsit, plus voluit.

Or, 2. In *restraining* the words of the Law, where it is clear from the Disposition of it,

Plus scripsisse Legem, minus voluisse.

For all human Laws must be defective, upon one of these two accounts. This will be best explained by the words of *Aristotle*, which I thus render paraphrastically :

That Part of unwritten Law, which is called EQUITY, or τὸ Ἐπιεικὲς, is a species of Justice distinct from what is written. And this must happen either against the Design and Inclination of the Lawgiver, or with his Consent. In the former Case, for instance, when several particular Facts must escape his knowledge : in the other, when he may be apprized of them indeed, but, by reason of their Variety, is not willing to recite them. For if a Case admits of an infinite Variety of Circumstances, and a Law must be made, that Law must be conceived in general terms³.

³ Arist. I.
Rhet. 14.

So that some things are omitted *volente et imprudente Legislatore*, which he would have defined and ascertained in his Law, if he had known them, and therefore may be the business of some person properly appointed, to add or supply them, as they arise, upon the presumption that the Lawgiver himself would, if he had known them. And here, *Legislator minus scripsit, plus voluit.*

Others again, *volente et sciente Legislatore*. The Law has nothing to do, but to speak universally. It deals only in general Precepts, and cannot descend to minute Particulars, not for want of knowing them, but for want of time, or precision, to enumerate them. For, to use the words of my last Author upon the occasion : Ὑπολείποι ὁ αἰὼν διαρρηγνύμενος.* And here, *Legislator plus scripsit, minus voluit.*

*Neque Leges neque SCta ita scribi possunt, ut omnes casus, qui quandoque inciderint comprehendantur, sed sufficit ea, quae plerunque accidunt, contineri*⁴.

⁴ D. 1. 3. 10.

*Non possunt omnes articuli singillatim aut Legibus aut SCtis comprehendi, sed cum in aliqua causa sententia eorum manifesta est, is, qui Jurisdictioni praeest, ad similia procedere, atque ita Jus dicere, debet*⁵.

⁵ D. 1. 5. 12.

* Tempus deficeret enumerantibus.

See Instances of this in the Law Book ⁶.

Equity thus circumstanced, is thus defined by Writers upon the Subject.

⁶ D. 4. 6. 26.
ult.
D. 19. 5. 11.

Επανόρθωμα τῆ νομίμου δικαίης.*

⁷ Aristot. V.
Ethic. 14.

Benigna Legis quaedam Interpretatio, vel Moderatio in aliquo casu, quem Lex sub rigoris universalitate comprehendit: in quo pro tanto Lex deficere dicitur, quia ipsum a Regula non excepit, quem tamen, si sic futurum attendisset, ab universalitate Regulae cum aliquo moderamine, vel simpliciter, excepisset.

Jus, quod expressa Legislatoris auctoritate destitutum, et extra Legis ac Consuetudinis terminos positum, vel Religioni Judicantis, vel Judicio Interpretis permittitur.

Interpretatio Juris benignior, et mentem Conditoris conjiciendam proponens, dum aliquid aut supplevit, aut restringit, ampliatur, aut limitat: quod nimirum verisimiliter et Legislator ipse factururus fuisset, si talis ei casus occurrisset.

Sc. Quod Aequitas suggerit, etsi Jure deficiamus, as the Lawyers write ⁸. ⁸ D. 39. 3. 2.

Whereas, on the contrary, *Strictum Jus*, to which this stands opposed, ⁵ is thus described,

Juris Scrupulositas ⁹.

⁹ D. 28. 3. 12.

Nimia Subtilitas ¹.

¹ Ibid.

Stricta Ratio ².

² D. 11. 7. 43.

Mera subtilitas ³.

³ D. 41. 3. 32.

Callidum et summum Jus ⁴.

².

Callida Interpretatio ⁵.

⁴ Cic. pro
Caecin. § 23.

⁵ Id. I. Offic.
10.

Jus vasfrum ⁶.

⁶ Hor. 2.

In order therefore to obtain this end, the Roman Law invented a Method, which I am going to describe.

An Action with them is defined, *Jus persequendi in Judicio quod sibi debetur* ⁷. If these are grounded upon the express words of the Law, *si recta* ⁷ J. 4. 6. pr. *ex Legis verbis descendunt*, they are called *Actiones Directae*: whereas those which descend obliquely, *quae non ex verbis Legis, neque ex sententia expressa proficiscuntur, sed Lenitate quadam interpretandi propter similem rationem receptae sunt*, are called *Actiones Vtiles* ⁸.

⁸ D. 3. 5. 47. 1.

And the words of Paulus, in one of the Laws cited in my margin, are *Vtraque Actio ejusdem potestatis est, eundemque habet effectum*.

4. 4. 11.

20. 1. 22.

27. 2. 24.

43. 18. 1. 6.

44. 7. 37.

C. 18. 6. 5.

* *Correctio Juris legitimi.*

Sed et eas actiones, quae legibus proditae sunt, si Lex justa ac necessaria sit, supplet Praetor in eo quod legi deest. Quod facit in Lege Aquilia, reddendo actiones in factum accommodatas Legi Aquiliae: idque Vtilitas ejus Legis exigit².

² D. 19. 5. 11.

³ D. 11. 3. 1.
pr.

Thus an Action lay, according to the Praetor's Edict³,

QVI SERVVM SERVAM ALIENVM ALIENAM RECEPISSE PER-
SVASISSEVE QVID EI DICETVR DOLO MALO QVO EVM EAM
DETERIOREM FACERET IN EVM QVANTI EA RES ERIT IN
DVPLVM IVDICIUM DABO.

But no Provision was made by this Law, if a Child should be seduced, or in like manner perverted. However, from the Contemplation of the public Utility, from the Spirit of this Edict, and from the Presumption of the Praetor's Intention, there lay an Action in this Case, as well as the former:

De filio filiave fam. corruptis huic Edicto locus non est: quia servi corrupti constituta Actio est, qui in patrimonio nostro esset; et pauperiorem se factum esse dominus probare potest, dignitate et fama domus integra manente. Sed Vtilis competit, officio Judicis aestimanda, quoniam interest nostra, animum liberorum nostrorum non corrumpi⁴.

⁴ L. 14. § 1. eod.

In like manner:

Quaquam deficiat Aquae pluviae arcendae Actio, attamen opinor Vtilem Actionem, vel Interdictum mihi competere adversus vicinum, si velim aggerem restituere in agro ejus, qui factus mihi quidem prodesse potest, ipsi vero nihil nociturus est. Haec Aequitas suggerit, etsi Jure deficiamus⁵.

⁵ D. 39. 3. 2.

⁵.

They perhaps have given them this Name, in Conformity to an Axiom in all Law whatsoever, *Injustum est, Jura salubriter pro Vtilitate Hominum introducta, in eorum detrimentum capi⁶.*

⁶ See D. 1. 3.

²⁵.

Thus Cicero writes unto his Brother Quintus upon the topic of Government, who, it seems, had not behaved uprightly in the Administration of his Province:

Ac mihi quidem videntur hac omnia esse referenda iis qui praesunt aliis: ut ii, qui erunt eorum in imperio, sint quam beatissimi — Est autem non modo ejus, qui sociis et civibus, sed etiam ejus, qui servis, qui mutis pecudibus praesit, eorum quibus praesit commodis Vtilitaeque servire⁷.

⁷ Ad Quint.
fratt. l. 1. 8.

⁸ III. 22.

And thus also he writes in his Offices⁸:

Potius diceret, non esse aequam, quia non esset utilis, Reip., quam, cum utilem esse diceret, non esse aequam fateretur.

So

So Justice, as we have seen, with him was *Habitus Animi, communi utilitate conservata, suam cuique tribuens dignitatem*⁸.

Thus *Epaminondas* reasoned in *Corn. Nepos* :

*Hanc Legem Epaminondas, cum Reip. conservandae causa latam videret, ad perniciem Civitatis conferre noluit : et quatuor mensibus diutius quam populus jusserat, gessit imperium*⁹.

There is a remarkable Law in the Digest, which I shall transcribe :

*Barbarius Philippus, cum Servus fugitivus esset, Romae Praeturam petiit, et Praetor designatus est : sed nihil ei servitutem obstitisse ait Pomponius, quasi Praetor non fuerit. At quin verum est, Praetura eum functum, et tamen videamus si servus, quamdiu latuit in dignitate Praetoria functus sit, quid dicemus? quae edixit, quae decrevit, nullius fore momenti? an fore, propter Utilitatem eorum, qui apud eum egerunt vel Lege vel quo alio Jure? Et verum puto nihil eorum reprobari. Hoc enim humanius est. Cum etiam potuit P.R. Servo decernere hanc potestatem : sed et si scisset Servum esse, Liberum effecisset. Quod Jus multo magis in Imperatore observandum est*¹.

⁸ II. de Invent.
53. Add. II.
ad Heren. 13.
D. 11. 7. 43.

⁹ Nep. XV. 7.

¹ D. 1. 14. 3.

There is something upon this topic worth consulting in *Aristotle*², where he compares the Judge to the *Αργυρογνώμων*, or the Assay-Master, *ὅπως διακρίνη τὸ κίεθλον δίκαιον ἢ τὸ ἀληθές*.*

² I. Rhetor. ult.

Let it be noted however, that the ordinary Judge, where the Law is silent, is not intitled to administer the Dispensation of Equity.

It is a Maxim in Law : *Vbi Lex non distinguit, nec nos distinguere debemus*.

And again, *Judicandum ex Legibus, non de Legibus*.

And it was said by an Ancient, That it was very dangerous for a Judge to affect, *φάνεσθαι φιλανθρωπότερον τῷ νόμῳ*.†

*Ipsa igitur, quae divertit, omnes omnimodo Servos suos manumittere vel alienare prohibetur : quia ita verba faciunt, ut ne eum quidem Servum, qui extra ministerium ejus mulieris fuerit, vel in Agro, vel in Provincia, possit manumittere, vel alienare. Quod quidem perquam durum est : sed ita Lex scripta est*³.

³ D. 40. 9. 12.

Τῆς ἀκριβείας τῶν νόμων ὁ δικαστὴς φροντισέτω‡.

¹.
⁴ C. 3 1. 11.

* Ut discernat adulterinam [rigidam] justitiam a vera [utili].

† Videri humaniorem Lege.

‡ Subtilitatem Legum Judex curae habeat.

The Power of Equity seems reserved, and that with great reason, not to the Judge, who is tied down by his Rule, but to the Lawgiver, or the supreme Authority, according to that well-known Maxim:

Ejus est interpretari, cujus est condere.

Thus *Constantine Imp.*

⁵ C. 1. 14. 1. *Inter Aequitatem Jusque interpositam Interpretationem nobis solis et oportet et licet inspicere⁵.*

And to this purpose are the words of *Vlpian*:

⁶ D. 1. 3. 13. *Quoties lege aliquid, unum vel alterum introductum est, bona occasio est, cetera quae tendunt ad eandem Vtilitatem, vel Interpretatione, vel certe Jurisdictione suppleri⁶.*

And therefore, in all well-directed Constitutions there is one Judge of strict Law, and another of Equity.

I shall conclude these Reflexions with two Remarks:

I.

That though the Notion of Equity is commonly attended with the Ideas of Humanity, Tendernefs and Compassion, and is always looked upon in the favorable light of Mercy, as is plain from many instances we have had occasion to quote above, and also from those which here follow:

⁷ D. 46. 51. 1. *Humanius est, si alter solvendo sit litis contestationis tempore, per exceptionem ei, qui solvit, succurri⁷.*

⁸ D. 1. 3. 18. *Benignius Leges interpretandae sunt, quo Voluntas earum conservetur⁸.*

⁹ D. 50. 17. *Semper in dubiis Benigniora praeferenda sunt⁹.*

56.

Yet with the Roman Lawyers, Equity is sometimes applied to Acts of Severity as well as Mercy:

¹ D. 2. 10. 1. *Aequissimum putavit Praetor dolum ejus coercere, qui impedit aliquem Judicio fisci¹.*

Pr.

Haec autem Aetio, ut Labeo scripsit naturalem potius in se quam civilem habet aequitatem: siquidem civilis deficit Aetio. Sed Natura aequum est, non esse impunitum eum qui hac spe audacior factus est².

² D. 47. 4. 1.

1. Add. 29. For,
³ 5. 3. 17.

If Equity be employed to fetch out the Sense of the Legislator, If it consists in extending similar Judgments to similar Cases, as *Tully* says, *Valeat Aequitas, quae paribus in causis paria Jura desiderat³*; and what that Maxim seems to lay down, *Vbi eadem Ratio, idem Jus esse debet*,

Lastly,

If the public Utility, the natural Foundation of Equity, be as much interested in the one Case as in the other,

Then

Then there can be no Question, but that Acts of Judgment and Severity will fall under the Description of Equity; which is no more than a fair and reasonable Interpretation, and consists in applying parallel Decisions to parallel Facts,

And to this purpose is that famous Passage in *Suetonius*:

Nec semper praescripta legum secutus, duritiem lenitatemve multarum ex bono et aequo, perinde ut afficeretur, moderatus est: Nam et in iis, qui apud privatos Judices plus petendo formula excidissent, restituit actiones: et in majore fraude convictos, legitimam poenam supergressus, ad bestias condemnavit.

⁴ in Claud.

But the Humanity of the Roman Constitution seems to have settled this for Law, that *Penal Statutes are not to be rigorously interpreted.* ⁵ 14.

And so the Lawyers write:

Interpretatione Legum poenae molliendae sunt potius quam asperandae. ⁵ D. 48. 19.

In poenalibus causis benignius interpretandum est.

^{42.}

⁶ D. 50. 17.

155. 2.

And it is recorded of *M. Antoninus*:

Erat mos iste Antonino, ut omnia crimina minore supplicio, quam legibus plecti solent, puniret.

⁷ Capitolin. in vita, § 24.

II.

We must take care to distinguish between EQUITY and DISPENSATION: which last is the Act of exempting from the common Obligation of a Law.

Dispensation (wherever that Authority is lodged) takes off the Obligation of the Law, the *vinculum Juris*, in regard to one particular Person, or suspends the Penalty; the Law abiding, in every other respect, and to every one besides, in its full Force of Obligation:

Equity, on the other hand, discharges no Obligation, but declares this or this to be a case, never comprehended under the Obligation of the Law, or the Intent of the Lawgiver.

The Former is the Act of the Legislator; a person endued with Legislative Authority; or One to whom the Legislation has delegated it:

The Other is the Act of a Judge, or some Minister of Justice.

That is merely Gratuitous and Voluntary:

This is a matter of Office and Duty.

For he is equally guilty of Injustice, who pronounces for the Letter, when he should decree for the Spirit: as that Judge who sets himself above Law, and distinguishes, where That has not distinguished.

The Causes for this Exemption are either

Intrinsic, when the Alteration of Circumstances may have introduced some Alteration in the Propriety of the Command: or when the Punishment annexed may appear too heavy and inadequate.

Or *Extrinsic*, when the Person, from whom the Forfeit is demanded, has either some former Service to plead; or can allege such Circumstances, as set him at a distance from other People, in regard to the Operation and Influence of the Law; or lastly, when some considerable Benefit may accrue by this Relaxation, as the expectation of some future Service from the Party so indulged, &c.⁸

⁸ Grot. II.
20. 24. — 27.
Pufend. I. 6.
17.

But the reasonable Causes for dispensing are too nice and indefinite to be recited. And great Tendernefs and Delicacy ought to be made use of in the Administration of them. Both, because the Authority and Tenor of Law ought not to be weakened by the frequent Relaxation of it: and because we ought to keep clear of that Umbrage and Discontent, which must attend those Persons, to whom this Grace had not been extended.

Dispensations may not improperly be divided into *Personal* and *Legal*. These may be called *Ordinary*, Those *Extraordinary*.

Personal or *Extraordinary*, are such, as nearly resemble the Emperor's Privileges. *Quod alicui ad meritum indulget, vel cui sine exemplo subvenit*⁹.

Legal or *Ordinary* I call such, as the Law has provided for People properly circumstanced, and assisted by legal Qualifications to ask them. Such with us are those Powers which are vested by Statute in the King and Archbishop for Ecclesiastical Purposes, as Grant of Pluralities, Commendams, &c. Such are Licences and Faculties under the Seal of the Bishop or his Officers.

For it must be observed, that *Dispensation* is a Term of the Canonists: though the Civil Law wanted not the Thing. And it has by them been defined

Rigoris Juris, per eum ad quem spectat, Canonice facta Relaxatio.

And

Provida Juris Communis Relaxatio, utilitate sive necessitate pensata.

⁹ Spec. Jur.
Tit. de Dispensat.

These are the Definitions to be found in *Durandus*¹, where there are some Things worth consulting, about the Matter of Equity and Dispensation.

L A W O F N A T U R E.

Dig. Lib. I. Tit. 1.

Inst. Lib. I. Tit. 2.

Grotius de Jure B. et P.

Selden de Jure N. et G. juxta disciplinam Hebraeorum.

Pufendorf's Law of Nature and Nations.

———— *de Officio Hominis et Civis.*

Sbarrock de Officiis secundum Jus Naturae. Oxon. 1660. 8:

G. Grotius de Principiis Juris Naturae. Cantab. 1673. 16^o.

Cumberland's Law of Nature.

Tyrrel's Disquisition of the Law of Nature. Lond. 1692. 8.

Hutchinson's Law of Nature.

Heineccii Elementa J. N. et G.

Burlamaqui's Principles of Nat. Law.

ALL Law is either *Natural* or *Instituted*.

The Power or Authority which gives it a Sanction, and may be called its *Efficient Cause*, is either the Voice of God through *Natural Reason*; or it is the *Voluntary* and *Arbitrary* pleasure of some Being or Beings, properly authorized for this purpose.

And this will appear more distinctly from the Definitions which have been given of each.

NATURAL LAW is the Rule and Dictate of *Right Reason*, shewing the moral Deformity or moral Necessity there is in any Act, according to its suitableness or unsuitableness to a reasonable Nature¹.

POSITIVE, VOLUNTARY, ARBITRARY OR INSTITUTED Law (for by so many names it may, and has been, called) is that which does not flow from the general Condition of human Nature, but has for its Objects things merely indifferent, and is founded in the sole pleasure of the Law-giver².

¹ Grot. I. 1.

^{10.}

² Pufend. I. 6.

18. Barbeyrac.

This ad Grot. I. 1.

13.

This is a Distribution very agreeable to Nature, and, as such, has been followed by the best Writers.

All Law, say the Antients, is either Φυσικός or Νομικός, which is the Division we have been attending to: either Φυσικός, the Dictates of Natural Reason, or Νομικός, that which is owing to some Positive Institution.

³ Aristotle means the same thing, though he varies in the Expression, when he says ³, that all Justice and Injustice is either τῇ Φύσει or τῇ Τάξει, by Nature or Order.

His Meaning is still the same, though he seems to vary still more, when ⁴ I. Rhet. 14. he says ⁴, that all Law is either Private, i. e. Particular: or Common, i. e. Universal.

Λέγω δὲ Νόμον, τὸν μὲν ΙΔΙΟΝ, τὸν δὲ ΚΟΙΝΟΝ. ΙΔΙΟΝ μὲν τοῖς ἐκάστοις ὁρισμένον πρὸς αὐτὸς, καὶ τέτων τὸν μὲν ἀγραφόν, τὸν δὲ γεγραμμένον. ΚΟΙΝΟΝ δὲ τὸν κατὰ Φύσιν. *

And these are the very words of the Emperor: *Omnes Populi, qui Legibus et Moribus reguntur, partim suo proprio, partim communi omnium hominum Jure utuntur* ⁵.

⁵ J. 1. 2. 1.
From Gaius.
D. 1. 1. 9.

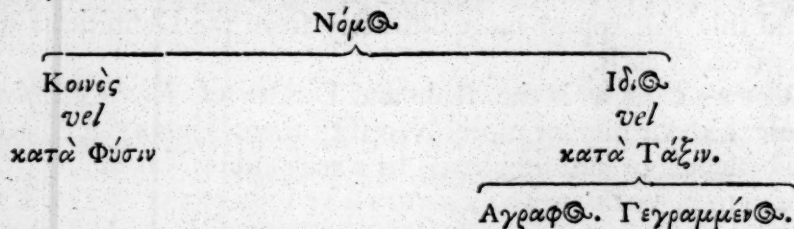
⁶ Arist. I.
Rhet. 14.

For both Writers, by common or universal, mean natural Law, or the Voice of human Reason, which speaks to all Men alike, ὃ μαντεύοντί τι πάντες, φύσει κοινὸν δίκαιον καὶ ἀδίκον, καὶ μὴδεμία κοινωνία πρὸς ἀλλήλους ἢ, μὴδὲ συνθήκη ⁶. †

And by private or particular, the proper Institutions of separate Communities, differing from each other, according to the different features of Government, the Wants and Exigencies, the Temper, Disposition and other Circumstances of each Society.

It is only considering the same thing in different Lights. Thus the Law, which is said to be Natural in regard to its Origin or its Principle, is also said to be Common (or Universal) in regard to the Extent of its Influence. And so also is Positive Law, upon the same Principles, called Private, Proper, (or Restrained) Law.

So that Aristotle's Distribution stands thus:



* Dico autem Legem aliam propriam, aliam communem. Propriam quidem eam quae singulis Populis definita est inter ipsos: atque ex his hanc quidem non-scriptam, hanc autem scriptam. Communem vero eam appello, quae est secundum Naturam.

† Est enim quoddam, quod augurantur omnes, natura commune justum et injustum, etiamsi nulla societas inter ipsos intercesserit, nullaque pactio.

This.

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This twofold Division of Law, as it is the earliest, so it is perhaps the best, and has been generally received both by Lawyers and Philosophers:

*Nondum neque Naturali, neque Civili Jure descripto*¹.

¹ Cic. pro
Sextio. § 41.

*Quarundam rerum dominium nanciscimur Jure Naturali—quarundam Jure Civili*².

² J. 2. 1. 11.

*Qui Remp. constituit, eamque Legibus ornare cupit, duabus his attendens viis Legislationem conficit. Aut enim Lege Gentium sancit, quas et Naturales abusive appellamus, aut Civiles, et [eas] vel scriptas, vel non scriptas*³.

³ Theophil.
Paraphr.
Inst. I. 2. pr.

For it must be understood, that there is among the Moderns a threefold Division of *Jus*, into *Naturale*, *Gentium*, and *Civile*. But the Ancients generally made but one of the two former, as we have just now seen from *Theophilus*, and included under one Idea the Consideration of *Jus Naturae* and *Gentium*. So in the last cited Passage of *Justinian*, when produced at large:

*Quarundam rerum dominium nanciscimur Jure Naturali, quod sicut diximus, appellatur Jus Gentium: quarundam Jure Civili. Commodius est itaque a vetustiore Jure incipere. Palam est autem vetustius esse Jus Naturale, quod cum ipso genere humano rerum Natura prodidit. Civilia enim Jura tunc esse coeperunt, quum et Civitates condi, et Magistratus creari, et Leges scribi coeperunt*¹.

¹ J. 2. 1. 11.
Add. § 41. cod.
D. 16. 3. 31.
pr.

And the Reason is plain. For *Gaius*:

*Quarundam rerum dominium nanciscimur Jure Gentium, quod Ratione Naturali in homines peraeque servatur*²—.

19. 2. 1.
47. 2. 1. 3.
50. 16. 42.
50. 17. 84. 1.

*Quod Naturalis Ratio inter omnes homines constituit, id apud omnes peraeque custoditur, vocaturque Jus Gentium, quasi quo Jure omnes Gentes utuntur*³.

² D. 41. 1. 1.
pr.
³ D. 1. 1. 9.
J. 1. 2. 1.

Thus interpreted by *Theophilus*:

Ὅσα ὁ ΦΥΣΙΚΟΣ ἦτοι ΕΘΝΙΚΟΣ λόγος μεταξὺ πάντων ἀνθρώπων ἐφεῦρε ταῦτα παρὰ πᾶσιν ἔθνεσι φυλάττεται, ἔ Jus Gentium προσαγορεύεται.

And thus is *Tully* to be understood;

*Quoniam hoc si minus Civile Jure perscriptum est, Lege tamen Naturae, communi Jure Gentium, sancitum est*⁴.

⁴ De Harusp.
Relp. § 14.

Where he cannot mean to establish a threefold Division of *Jus Naturae*, *Gentium* and *Civile*; but his words, *Communi Jure Gentium*, are a Gloss or Explanation of *Lege Naturae*. He expounds or illustrates the one by the other.

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For the same Author best explains his own Meaning :

*Neque vero hoc solum Natura, id est, Jure Gentium; sed etiam Legibus Populorum, quibus in singulis Civitatibus Respublica continetur, eodem modo constitutum est*⁵.

⁵ Cic. III. Offic. 5.

And this will serve to reconcile such Authors, as seem to differ.

Self-Defence by *Florentinus* is produced as an instance of the *Jus Gentium*⁶.

And yet it is properly the Dictate of the Law of Nature.

*Est igitur haec non scripta, sed nata Lex, quam non didicimus, accepimus, legimus, verum ex Natura ipsa arripuimus, hausimus, expressimus: ad quam non docti, sed facti, non instituti, sed imbuti sumus: ut si vita nostra in aliquas insidias, si in vim, si in tela, aut latronum, aut inimicorum incidisset, omnis honesta ratio esset expediendae salutis*⁷.

⁷ Cic. pro Milone, § 4.

*Naturae Jus est, quod Nobis non Opinio, sed quaedam innata vis affert, ut Religionem, Pietatem, Gratiā, Vindicationem, Observantiam, Veritatem——Vindicationem, per quam vim et contumeliam defendendo aut ulciscendo propulsamus a nobis*⁸.

⁸ Id. II. de Invent. 22. D. 43. 16. 1.

²⁷ 9. 2. 45. 4.

However *Florentinus*, or perhaps rather *Tribonian*, is not to be excused. After he had branched off the *Jus Gentium*, as proper to Mankind, from the *Jus Naturae*, which includes, with the Lawyers, the whole animal Creation, this was an improper instance of the *Jus Gentium*, considered distinctly. For where does the *Tutela Corporis* appear so strong as in Animals, even the weakest and most despicable?

*Feris Natura ipsa praescripsit, ut omnem semper vim, quacunque ope possent, a corpore, a capite, a vita sua propulsarent*⁹.

⁹ Cic. pro Mil. § 11.

*Dente Lupus, cornu Taurus petit, unde nisi intus Monstratum*¹⁰?

¹⁰ Hor. 2. Sermon. I. 22.

But the Fault, as I was observing, may belong to *Tribonian*. For the Digest being a kind of Patch-work, consisting of Extracts from the Roman Lawyers, reduced under several Heads by *Tribonian*, it is possible, that this instance of Self-Defence may have stood right in *Florentinus*, under the Article of *Jus Naturae* at large: but classed very inaccurately by the Compiler, under the more restrained consideration of *Jus Gentium*.

For *Jus Gentium*, as we shall see, when we come to consider it particularly, is understood by them to be that particular kind of species of *Jus Naturae*, quod solis hominibus inter se commune est, which belongs only to Subjects that are endued with Reason, and consequently excludes the Brute Creation.

My Objection to *Florentinus* may perhaps be best apprehended thus:

Though *Jus Gentium* may with great propriety be called by the common name of *Jus naturae*, as in their Origin and Sanction they are the same,

same, and Writers therefore, of all sorts, sometimes call it by either name indifferently; yet it does not follow, that I can call, with exact propriety, every Law of Nature by the name of *Jus Gentium*. For what Cicero says² is applicable here *mutatis mutandis*. *Quod Jus Naturae, non idem continuo Jus Gentium: quod autem Gentium, idem Naturae esse debet.* ² III. Offic. 17.

Thus (to return) Parental Piety, according to Pomponius, is *ex Jure Gentium*³. Whereas Pliny calls it, *Vim Legemque Naturae*⁴.

To accommodate therefore ourselves to Writers, who treat of this Division as three-fold, we must be acquainted with what that Division means. And I find it as high as the Age of A. Gellius, if however He is not to be taken in the same light with others, whom we have already produced:

*Ac primum ea non incallide conquirit, quae non Jure Naturae, aut Jure Gentium fieri prohibentur, sed Jure Legum*⁵. ⁵ Gell. VII. 3.

There is something like this Gradation in Cicero⁶, though it is not exactly the Distinction which the Moderns make between *Jus Naturae* and *Gentium*:

Societas, says he, *est latissime quidem quae pateat, omnium inter omnes; interior eorum, qui ejusdem Gentis sunt; propior eorum qui ejusdem Civitatis.*

What this *Jus Gentium*, as it is now understood, must mean, and how it stands distinguished from the *Jus Naturae*, we shall see in its proper place: we are at present only concerned with the *Jus Naturae*.

The Definition of which, as given us by Vlpian⁷, and from him by Justinian⁸, scil. *Jus Naturale est, quod Natura omnia animalia docuit*,⁹ J. 1. 2. pr. shall also have its proper consideration.

The Definitions of this *Jus* are various; the best is that of Grotius¹⁰: ¹⁰ I. 1. 10.

The Rule and Dictate of right Reason, shewing the moral Deformity, or moral Necessity there is in any Act, according to its suitableness or unsuitableness to a reasonable Nature.

*Jus, quod Deus per rectam Rationem inter omnes homines constituit, propter honestatem et turpitudinem*¹¹.

¹¹ Vitriarius.

*Complexio Legum ab ipso Deo immortali Generi humano per rectam Rationem promulgatarum*¹².

¹² Heineccius.

The Rest rowl much upon the same Idea: and the Recital of a few will suffice. *Ratio imperans bona et honesta — Quod naturali Ratione dictante honestum est — Jus non excogitatum a nobis, aut ab aliis introductum, sed ingenitum et innatum.*

Much to the same purpose are these also, whether Definition or Description:

Saeculis

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³ Cic. I. de
Legg. 6.

⁴ Id. II. de
Invent. 22.

⁵ Cic. I. de
Legg. 6.

Saeculis omnibus ante nata, quam scripta Lex ulla, aut quam omnino Civitas constituta³.

Quod non Opinio genuit, sed quaedam innata Vis inseruit⁴.

Itaque arbitrantur Prudentiam esse Legem, cujus ea vis sit, ut recte facere jubeat, vetet delinquere⁵.

Now what are the Marks and Evidences of this Rule of our Manners; from what Authority it derives its Obligations; how it is notified; and where it is to be consulted, is a Disquisition, which has set Writers at a great Variance, and has been the occasion of as much wrangling, as any other Inquiry whatsoever.

The Ancients, one Sect at least, understood it thus:

Lex est Ratio summa, insita in Natura, quae jubet ea quae facienda sunt, prohibetque contraria. Eadem Ratio, cum est in Hominis mente confirmata et confecta, Lex est⁶.

⁶ Id. ibid.

Or, perhaps, better thus:

Lex est Ratio, summa insita in Natura, quae jubet ea quae facienda sunt, &c.

Because, though by *Natura* here may be meant the Deity, yet, as They taught that the whole Range of Existence was only *one Nature* differently exerted, there is a greater Propriety and Emphasis between *summa Natura*, and *Homini mente*.

This is the Lecture of the Porch. There subsisted, say They, always in the Divine Mind, *summa in Natura*, a Reason, a Discretion between Right and Wrong, and a Separation of these two Principles. The Reason of Man is a kind of Emanation from that Fountain; and when our Sentiments are accommodated to that most perfect one of the Supreme or Infinite Nature, then is regularly produced that Law we are to act by in natural Duties, otherwise called the *Law of Nature*.

This kind of reasoning has been followed by some of the Moderns.

Lex Aeterna in sola Divinae Mentis Ratione consistit. Lex vero Naturalis——nihil aliud est, quam Divini Numinis Impressio: cujus solius Communicatione⁷——

⁷ Bolognet. de
Jure et Ac-
quit. C. 3.

But there wants no modern Voucher of the Truth of this Observation. I am furnished with some by Cicero himself:

Sequitur ut eadem sit in his [Diis], quae in genere humano Ratio, eadem Veritas utrobique sit, eademque Lex: quae est Recti praeceptio, pravique depulsio. Ex quo intelligitur Prudentiam quoque et Mentem a Diis homines pervenisse——Quod si inest in hominum genere Mens, Fides, Virtus, Concordia, unde haec in Terras, nisi a Superis, defluere potuerunt? Cumque sit in nobis Consilium, Ratio, Prudentia, necesse est Deos haec ipsa habere majora⁸.

⁸ II. De N. D.
31.

Est

Est enim Lex nihil aliud nisi recta, et Numine Deorum tracta, Ratio, imperans honesta, prohibens contraria^a.

^a XI. Philip.
12.

Est igitur, quoniam nihil est Ratione melius, eaque et in Homine et in Deo, prima Homini cum Deo Rationis Societas^o.

^o I. de Legg.
7.

And this Society, or Communication of Reason, lead on to that Doctrine, viz *That there subsists a Communication, or Similitude of Virtue, Law and Religion, between the two Natures also*:

Οἱ δὲ ἀπὸ τῆς Στοᾶς καὶ τὴν αὐτὴν ἀπεθὴν εἶναι θεῶν καὶ ἀνθρώπων εἰρήκασιν.*

^a Proclus in
Timaeum
Plat. lib. 2.

*Est igitur, quoniam nihil est Ratione melius, eaque et in Homine et in Deo, prima Homini cum Deo Rationis Societas. Inter quos autem Ratio, inter eosdem etiam recta Ratio communis est. Quae cum sit Lex, Lege quoque confociati Homines cum Diis putandi sumus. Inter quos porro est communio Legis, inter eos communio Juris est. Quibus autem haec sunt inter eos communia, et Civitatis ejusdem habendi sunt*².

² Cic. I. de
Legg. 7.
³ See Aristot.
X. Ethic. 8.

This Opinion, however whimsical and romantic¹ in its Principle, yet, if we look upon it as an useful Fable, it may be productive of a happy Moral; and that shall be this:

The Law of Nature will be found to be the Dictate of *Right Reason* (the Sentiments of our Nature in its utmost Perfection) that fees, compares, examines, judges and pronounces the Fitness or Unfitness, the Suitableness or Unsuitableness of moral Actions with the truest Exactness. It is the Exercise of our Faculties in proper Pursuits, and in such a manner, as God, who communicated them, intended we should employ them. And, to pursue the Scheme: As God is the Author of these Faculties; as these Faculties point out our Duty; He will be ready, by that Tribunal he has erected in every Man's Conscience, to support the Duty he has recommended, and discourage the Breach of. The System is not composed without his Intervention. This is a *Law written in our Hearts*⁴ ⁴ Rom. II. 15. by his own Hand; and the Law of Nature will appear to be, what it really is, the Law of God.

Λόγῳ δὲ ὁρθῶ πείθεσθαι ἔστι θεῶν ταυτὸν εἶναι. Τὸ γὰρ λογικὸν γένος εὐμοιρῆσαν τῆς οἰκείας ἐλλάμψεως ταῦτα βέλει, ἃ ὁ θεὸς ὀρίζει νόμος. καὶ γίνεται σύμφητος θεῷ ἢ κατὰ θεὸν διακαμένη ψυχῇ, καὶ πρὸς τὸ θεῖον καὶ τὸ λαμπρὸν ἀποβλέπεται πρᾶξι αὐτῶν πρᾶτῃ.[†]

⁵ Hierocl. in
Pythag.
pag. 168.
Edit. 1742.

* Stoici dixerunt unam eandemque esse Virtutem Deorum Hominumque.

† Rectae vero Rationi parere atque Deo idem est. Natura enim Rationalis, cum propria luce fruitur, illa vult quae divina Lex statuit, atque Deo consentit animus qui secundum Deum se habet, ac ad id quod divinum est et splendidum respiciens facit quaecunque fecerit.

* pag. 206. And again * :

Ο δὲ οἰκοθεν Λογισμὸς αὐτὸς ἑαυτῇ καλακῆαν ἀνάγκῃ ἔχει. Τῷτον ἐπίτροπον ἡμῖν ὁ Θεὸς ἐπέστησε, τῷτον παιδαγωγὸν καὶ διδάσκαλον. Τῷτον καὶ νῦν δικαστὴν ὁ λόγος τῶν ἡμερινῶν ἔργων ποιεῖται, ἃ παρ' αὐτῇ τὴν κρίσιν ἐκδέχεται, ἵν' αὐτὸς ἑαυτὸν ψηφίζῃται ἀποδοχῆς ἢ ἐπιπλήξεως ἄξιον. * Συζῇν Θεοῖς. Συζῇ δὲ Θεοῖς ὁ συνεχῶς δακνὺς αὐτοῖς τὴν ἑαυτῇ ψυχὴν ἀρεσκομένῳ μὲν τοῖς ἀπονεμομένοις. ποιῶσαν δὲ ὅσα βέλῃται ὁ δαίμων, ὃν ἐκάσῳ προσάτῳ ἡ γῆμονα ὁ Ζεὺς ἔδωκεν, ἀπόσπασμα ἑαυτῆς. ἔτι δὲ ἐστὶν ὁ ἐκάσῳ νῆς ὁ λόγος. †

* M. Antonin.
II. 27.

Vtiles esse autem opiniones has quis neget, cum intelligat, quam multa firmentur jurejurando, quanta salutis sint foederum Religiones, quam multos divini supplicii metus a scelere revocarit : quamque sancta sit societas Civium inter ipsos, Diis immortalibus interpositis, tum Judicibus, tum Testibus.

* Cic. II. de
Legg. 7.

But, as this Principle may admit of some Doubt, and minister occasion for Dispute, and by *Right Reason*, (as Bishop *Atterbury* said of the Sceptic) every one would be willing to mean *HIS OWN*, this Criterion by some has not been judged sufficient. It was the saying of a good Writer, that the Discourses about *Natural Law* were, of all, the fullest of Mistakes, and most liable to Error. The Principles of that Law are level to vulgar Capacities : they are what all Men pretend to. By which means *vulgar Errors* and Conceptions, founded not upon Reason but Custom, pass for the Dictates of the *Law of Nature*.

Others therefore have recourse to the general Voice of Nature, which is to be fetched from the constant and united Sentiments of all the Nations of the World. And that universal Agreement, with them, is this

* Grot. I. 1. Law we are enquiring for.

12.

Omni autem in re Consensio omnium Gentium Lex Naturae putanda est.

* Cic. I.
Tusc. 13.

Jus Commune omnium Nationum, eo quod ubique insinctu Naturae, non Constitutione aliqua, babeatur.

* Isidor. I. 5.
Orig.

But when we search for this Determination, we must take our measures, say they, from the more civilized and cultivated ; from the best Endowments and best Dispositions ; and where the marks of *right Reason* are the fairest. We must search where Nature is brightest. For that

* Sed Conscientia intus sedens, ipsa sibi met auscultare necesse habet. Hanc Deus nobis praesidem constituit, hanc custodem atque magistram. Hanc nunc quoque judicem diurnorum operum Carmen [Pythagorae] facit, et judicium ejus expectat, ut ipsa de se, utrum laude an reprehensione digna sit, decernat.

† Cum Deis vivendum. Hoc autem faciet, qui animum exhibuerit ita jugiter affectum, ut rebus sibi destinatis acquiescat ; faciatque quaecunque genius ille voluerit, quem sui particulam a se avulsam Jupiter cuique attribuit, praesidem ducemque eidem futurum. Hic autem cujusque mens est et ratio.

would be but a bad Glafs to read the Lessons of Duty in, where we fee her deformed or misrepresented.

Νῦν δὲ Ἐ παρ' ἀνθρώποις τοῖς τε ὀρθῶς ἢ ὑγιῶς ἔχουσι ἐς δίκαιον ἀκίνητον, ὃ φυσικὸν λέγεται. ἃ δὲ τοῖς νοσῶσι τὰς φρένας, Ἐ διεσραμμένοις ἢ δοκεῖ δίκαιον, ἔθεν διαφέρει³. *

³ Paraphr. Aristot. Nicom. V. 10.

Quorum aut ingenio aut virtute animus excellit, eos arbitramur, quia Natura optima sunt, cernere Naturae vim maxime⁴.

⁴ Cic. I. Tusc. 15.

Quid illud? Num dubitas, quin specimen Naturae capi deceat ex optima quaque Natura⁵?

⁵ Ibid. 14.

And this is the rather to be mentioned, because there are, and have been, several Nations, where the Principles of Nature have been debauched, and the Rules of Right and Wrong but dim and ineffectual.

Thus for instance, Incest in the Ascending and Descending Line is held by the best and wisest Nations to be against the Law of Nature⁶:

⁶ D. 23. 2. ult.

—— *Gentes tamen esse feruntur,
In quibus et Nato Genitrix, et Nata Parenti
Jungitur⁷.*

⁷ Ovid. X. Met. 332.

Alluding probably to the Persian Customs, of which we find this instance in *Catullus*:

*Nascatur Magus ex Gelli Matrisque nefando
Conjugio, et discat Persicum Haruspicium.
Nam Magus ex Matre et Gnato nascatur oportet,
Si vera est Persarum impia Relligio⁸.*

⁸ Epigr. in Gell.

Indeed ——— *Τοῦτο πᾶν τὸ βάρβαρον γένος,
Πατήρ τε θυγατρὶ, παῖς τε μητρὶ μίγνυται,
Κόρη τ' ἀδελφῷ⁹. †*

⁹ Euripid. Andromach. 173.

And what extravagant Liberties have been taken by many barbarous Nations even in the clearest natural Duties, may be seen in a very good Account, written by *Alexander ab Alexandro*¹. And many are collected also by *Pufendorf* upon this occasion².

¹ I. Genial. Dier. 24.

*A. Gellius*³ informs us, that several Nations, as the *Aegyptians* and *Lacedaemonians*, held Theft to be lawful. But yet no Man would take his Measures of Right and Wrong from them in this Particular.

² II. 3. 8 Add. Euseb. Praep. Evang. I. 4. IV. 15—17.

So *Socrates*⁴ lays down, that the Worship of the Deity, Reverence to Parents, Abstaining from that kind of Incest of which I have been speak-

³ XI. 18. ⁴ Xenoph. Memorab. I. 4.

* *Nunc vero etiam inter homines, qui recte, et, ut oportet, sapiunt, immobile aliquod jus est, quod naturale dicitur: quod si quibusdam, quibus mens laborat, aut perversa est, jus non videtur, nihil refert.*

† *Tale est omne Barbaricum Genus,
Pater enim Filiae et Filius Matri miscetur,
Sororque Fratri.*

ing, are the first Principles of Nature, and that they are not less so, because some few Nations do not hold them such.

Were I to appeal to the Judgment and Practice of Nations in a Question of the Lawfulness of Marriage between Brother and Sister, an *Athenian* would give me one kind of Answer, a *Lacedaemonian* a second, and an *Aegyptian* a third.

Ο μὲν ἐν Ἀθηναῖς Σόλων ὁμοπαῖδας ἐφίεις ἄγεαθ, τὰς ὁμομητρίδας ἐκώλυσεν. ὁ δὲ Λακεδαιμονίων νομοθέτης ἔμπαινον τὸν ἐπὶ ταῖς ὁμογαστρίδας γάμον ἐπιτρέψας, τὸν πρὸς τὰς ὁμοπαῖδας ἀπέπειν. ὁ δὲ τῶν Αἰγυπτίων χλευάζων τῇ ἐκάλειρων εὐλάβειαν, ὡς ἡμίεργα διαταττομένων, εὐφώρησεν εἰς ἀσελγειαν, — παραχρὴν ἄδαν ἀπάσας ἀδελφὰς ἄγεαθ, τὰς τε ἰδίας τε ἐτέρων τῶν γονέων, — καὶ τὰς ἐξ ἀμφοῖν.*

⁵ Philo de
S. ecial Egg.
T. II. pag 303.
Edit Mangey.
⁶ f. de Jure
Nat et Gent.
etc. 6.

⁷ II. 3. 7—9.

⁸ Pufendorf.

II. 3. 14, 15.

Id. de Offic.

H. et C. I. 3.

Noodt. Com-

ment. ad Dig.

Lib. I. Tit. I.

pag. 5. Edit.

Fol.

*Selden*⁶ therefore and *Pufendorf*⁷ will not abide by this Determination. They will not submit to refer the Disputes which may arise about natural Law, to a Decision, which in many Cases is not to be had, is very precarious where it can, and never of that Weight, as to carry with it an Obligation.

These Considerations with many more Inconveniencies attending this Cri-

terion, have led Philosophers and Lawyers to go to work another way⁸.

And this is done by appealing to the first Principles of Humanity, our own Apprehension, the Sense of our Condition, and in a word, not the Reasonings, but the general Feelings, of Mankind.

It wants no Reflection, no Penetration, to be acquainted with that in-born Inclination, which every Man entertains for his own Happiness and Preservation: and it wants but little, to inform him, that his Neighbour has the same Affections, and the same Attentions likewise.

These are Sentiments interwoven into our Constitution, not what we argue ourselves into, but what we apprehend.

Another of these simple Apprehensions is the Consciousness which every Man feels of his own Weakness, and Want of Support: and that if a Man was to depend upon himself alone, he would be, of all Creatures, most helpless and most miserable.

Now the Reflection upon these natural Desires, attended with these mutual Wants, or rather, the bare Contemplation of our Circumstances and Condition, cannot but lead even the most simple or inattentive into a Conclusion, that we were made for SOCIETY, or one another.

Though many other Considerations might be produced, which tend to prove the same Direction of our Natures, I chose to pick out only such, as lye level to all Apprehensions, and cannot be disputed. In a Disquisi-

* *Quamvis Athenienses Solo hoc observat in uterinis tantum germanis, eodem patre prognatis relinquit liberum. Contra Lacedaemoniorum Legislator, permissa uterinis connubio, eodem patre genitis interdicat. At Aegyptius ridens utriusque simplicitatem, et semiperfecta placita, laxavit libidinem—permissa licentia ducendi sorores, sive per alterutram parentem, sive per utrumque cognatas.*

tion of this sort, we are to take our Stand upon Principles laid in Nature: and, in order to inquire what the Laws of Nature are, we must first examine what our Nature is.

These are not Proofs offered to our Judgments, but Truths advanced to our Understanding. We are not concluding, but apprehending.

Signum autem—ab argumentis jam separavi—Pro certis autem habemus primum, quae sensibus percipiuntur, ut quae videmus, audimus, qualia sunt Signa. Deinde, in quae communi opinione consensus est, Deos esse, praestandam pietatem parentibus.

⁹ Quintilian,
V. 10.

Nunc ergo ad id revertor, de quo desideras dici: quomodo ad nos prima boni honestique notitia pervenerit. Hoc nos docere Natura non potuit. Semina nobis scientiae dedit, scientiam non dedit.—Nobis videtur Observatio collegisse, et rerum saepe factarum inter se collatio, per analogiam nostro intellectu et honestum et bonum judicante.

¹ Senec. Epist.
20.

Now this Society so necessary, and so natural to Mankind, must be maintained by all those helps which are proper to support it. For Nature which directs the End, directs the Means also. And those Means are what we understand by the LAWS OF NATURE.

And here the more general and fundamental ones carry with them much the same degree of Evidence and Conviction. They are scarcely proposed before they are consented to. How willingly do I assent to the Truth of Natural Law, *alterum ne laedas*, when I feel from my own Experience, that my Neighbour must delight in the Happiness of His Nature; and when the same Experience informs me, that without his Assistance I am not able to procure My own?

But, if in deriving the Streams of Duty, and in raising less striking Theorems from more avowed Principles, (for indeed how nice is sometimes the Process from the first Dictates of Natural Law to the last?) If, in deducing one Law from another, in weighing Obligations, in adjusting Relations, in confronting Circumstances, and in many similar Operations, there should be found something above the Level of Vulgar Philosophy, it is still the Voice or Rule of Nature, which speaks alike to all, though it happen not to be understood alike by all. If a Man is dictating to Scholars of several Capacities, his Doctrine is not the less true, though it is not equally comprehended. And it would be thought very unreasonable, if those of confessed Disabilities should not take their Measures, in these nicer Circumstances, from such, whose Condition, Skill or Opportunities, have given them a kind of Jurisdiction in these Examinations.

The Figures of a Square, a Circle or Triangle, strike all Men's Senses alike: the Powers and Properties of these, and the useful Theory which is drawn from them, are confined in a manner, to a Few. Yet many in their manual Operations, scruple not to be directed by the Rules and Principles

Principles which are deduced from these several Figures, though they have not Leisure or Powers to attend to the Process of that Deduction.

But there is not that Abstraction in the Rules of Natural Law. The most substantial Duties are legible to the meanest Capacities. There is a Path which no one can mistake; and when the Roads come to divide, there is to be found somewhere a Direction to shew us the Right.

* See above,
pag. 44.

And thus far it is well. But be it remembered, that we have yet got no farther than Expediency; and Expediency, like Admonition*, can only recommend, not oblige. For Obligation is a Word of Law. How this Duty is enforced, and how Natural Reason grows up into Natural Law, will be seen more properly in the following Section, which indeed is rather a Continuation of this, than a new or distinct Consideration of itself.

I am sensible, that there are other Criteria which others have set up in their Searches after Natural Law. But as they fall not exactly within my Design, or my Compass, I shall be excused for passing them over. One indeed there is, which has made much Noise, and what I could not excuse myself for neglecting; and the Reflection upon that shall be the Subject of the following Section.

V L P I A N's

VLPIAN'S DEFINITION OF THE LAW of NATURE.

Bolognet. de Jure et Aequit. C. 5. et 6.

Connan. I. de Jur. Civ. 4.

Cypraeus de Matrimoniis, C. 6.

Grotius, I. 1. 11.

Selden. de Jur. Nat. et Gent. etc. I. 4. 5.

Salmasius de Vsuris, Cap. 9. et 20.

Pufendorf, II. 3. 2. 3.

Rachelii Prolegom. ad Cic. de Offic.

And the Commentators upon the first Title in the Digests.

IVS NATVRALE EST QVOD NATVRA OMNIA ANIMALIA
DOCVIT¹.

And from him the Emperor². And the Greek Law after him³.

The whole of *Vlpian* runs thus :

Jus Naturale est, quod Natura Omnia Animalia docuit. Nam Jus istud non humani generis proprium est, sed omnium Animalium, quae in Coelo, quae in Terra, quae in Mari nascuntur. Hinc descendit Maris atque Feminae Conjunctio, quam Nos Matrimonium appellamus. Hinc Liberatorum Procreatio: hinc Educatio. Videmus enim caetera quoque Animalia istius Juris peritia [alii perita] censer.

¹ D. 1. 1. 1. 3.

² J. 1. 2. pr.

³ Basilic. l. 2.

Harmenopul.

I. 1. 14.

Before I enter upon this Subject, my Reader perhaps may not be displeased with a little Extract out of *Plutarch*, relative to the Occasion :

“ It was the Custom of some Greek Cities,” (says that great Writer in words to this purpose) “ to carry their Disputes abroad, and to adjudge their Appeals by the Award of their Neighbours. Now what was this but a tacit Acknowledgment, that they distrusted either their own Integrity, or their own Sufficiency, who thus could look upon Justice, as a Commodity of a foreign Growth and Importation ! In like manner, when the most considerable natural Duties are weighed and examined by the Process of some correspondent Actions in the animal Creation, it must be, either because Philosophers could not agree in their Conclusions
“ upon

VLPIAN'S DEFINITION OF

" upon these Inquiries, and therefore appealed to Instinct, as the most
 " unprejudiced Judge; or it may be, the general Depravity of Human
 " Nature had made it necessary. The Simplicity to be met with in the
 " Actions of our Fellow-Creatures shews Nature pure and untainted,
 " not disguised by Art, or clouded with Passion, not dashed with Phi-
 " losophy, not debauched or corrupted with a multiplicity of contra-
 " dictory Opinions. Nay indeed the farther back we go, (adds he) the
 " more discernible is this Simplicity. The Vegetable World, is in a
 " manner tied down by the Root to preserve an Uniformity of Nature,
 " without Sense or Instinct to mislead it. The Animal indeed, is some-
 " times betrayed by Appetite and Desire into some small Digressions from
 " natural Principles; but, though it sometimes deviates, the Random
 " is never greater than that of a Ship that rides at Anchor. But Reason
 " lastly, that great and boasted Director of the human Species, is always
 " hunting after new Opinions, and, by striking out perpetually into
 " the Bye-Paths of Fancy, is never to be met with in the plain and
 " beaten Road of Nature."

*Tract. XXXI.
 De Amore
 Proles, init.

Much in this manner, allowing also for the Imperfections of the Trans-
 lation, writes that incomparable Author *, and let me add, with some con-
 cern, that neglected one. The whole Passage, or rather the whole Tract,
 is worth consulting upon the Question we are now engaged in.

But to return: This vain Notion of a Rule of Action, that was com-
 mon to Men and Brutes, thus indiscreetly mixed with the Roman Law
 by *Vlpian*, has had some Attention paid to it, from the Observation of
 that Resemblance, which is sometimes to be found between those Acts,
 that Instinct and Inclination produce in the Animal, and Reason and Phi-
 losophy in the Human, System.

And indeed but too many Writers have contributed to propagate this
 Notion by an unguarded way of expressing themselves:

*Earum Bestiarum quaeque suum tenens munus manet in Lege Na-
 turae* ⁵.

⁵ Cic. V.
 Tusc. 13.

— *sunt et rabidis Jura insita monstribus,
 Fasque suum* ⁶.

⁶ Stat. I. Theb.
 459.

Τὸν τῆς φύσεως διασώζει νόμον, ὃς ἔστι ἀνθρώποις, καὶ θηρίοις εἰς ὃ αὐτὸς
 ἅπασιν ὥρμαται.*

⁷ Demost. c.
 Aristogit. I.
 T. III. p 487.
 Ed. Cant.

Τὸ δὲ ἔστι τοῖς ἀλόγοις μετεῖναι τινὸς ἀρετῆς κατὰ φύσιν — καὶ
 πολλὰ τῶν ἀνθρωπίνων πλεονεκτημάτων καὶ θαυμαστὰ ἔχειν συγκεκληρω-
 μένα, τῷτο ἤδη μέγα. †

* *Naturae Legem tuetur, quae una hominibus et brutis definitur.*

† *Quod vero brutis animalibus — virtutes quaedam a Natura insitae sint, eademque mul-
 tas et admirandas hominum proprietates possideant, id sane magni momenti est.*

These

These are the words of *Aelian* in the Preface to his History of Animals: and the Book which follows, abounds with Instances to this purpose.

St. *Ambrose* mentions the *Hospitalia Avium Jura*, and adds moreover, *Aves non scripta, sed nata Lex stringit* ⁸.

In Animalibus et Bestiis ipso Naturae Jure praescriptum est, ut praegnantes ad partum usque non coeant ⁹.

Εἰς γὰρ τις ἐς τὸ ΚΟΙΝΟΣ ἀνθρώποις ΝΟΜΟΣ,
καὶ θεοῖσι τὸτο δόξαν, ὡς σαφῶς λέγειν,
ΘΗΡΣΙΝ ΤΕ Πᾶσι, τέκνα τίτλησθαι φιλεῖν ¹. *

Αλλ' ἐσιν ἡμῖν τοῖσιν ὄρνισιν ΝΟΜΟΣ
Παλαιός, ἐν τοῖς τῶν πελαργῶν ΚΤΡΒΕΣΙΝ.
Ἐπὴν ὁ παλῆρ ὁ πελαργὸς ἐκπέησίμους
Πάντας ποιήσῃ τοὺς πελαργίδας τρέφων,
Δεῖ τὰς νεοτῆρας τὸν μάτρεα πάλιν τρέφειν ². †

————— *O tetrum genus,*
Nullaque victum lege melioris soli,
Ferae quoque ipsae Veneris evitant nefas ³.

And so *Pliny* writes, that They can apprehend the Proximity of Blood:

Namque et Cognationum Intellectus in iis est ⁴.

And, what is very remarkable, that Elephants have a Sense of the Faith of an Oath. This is what was advanced also by *Celsus* in some part of his Objections, as appears by *Origen* ⁵. Possibly *Celsus* had an eye to that Passage in *Pliny*:

Alienae quoque Religionis intellectu creduntur maria transitori non ante naves conscendere, quam invitati Reſtoris jurejurando de reditu ⁶.

That Author begins his VIIIth Book in a very high Strain:

Maximum est Elephas, proximumque humanis sensibus. Quippe intellectus illis sermonis patrii, et imperiorum obedientia, officiorumque quae didicere, memoria: amoris et gloriae voluptas: immo vero (quae etiam in homine rara) Probitas, Prudentia, Aequitas, Religio quoque Siderum, Solisque ac Lunae Veneratio.

* Communis haec Lex stirpis est mortalium,
Trabens et ipsos in sui assensum Deos,
Ferasque: amare quicquid est ex se satum.

† Sed Lex est nobis Avibus
Vetusta in Ciconiarum tabulis:
Postquam pater Ciconia volatiles
Omnes fecerit pullos suos, atque enutriverit,
Pullis oportet patrem vicissim alere.

⁸ V. Hexaemer. 16.

⁹ Hieron. Comment. in Epist. ad Ephes. l. III.

¹ Euripid. in Dictyc.

² Aristoph. Aves. § 1353.

³ Senec. Hippolyt. Act. 3. § 77.

⁴ VIII. H. N. 42.

⁵ lib. 4. c. Cels.

⁶ VIII. H. N. 1.

So again :

Idem Divinationem quandam Justitiae. Cum Bocchus Rex XXX. Elephantis totidem, in quos saevire instituerat, stipitibus alligatos objecisset, procurstantibus inter eos qui lacefferent, non potuisse effici, ut crudelitatis alienae ministerio fungerentur⁷.

⁷ Id. VIII. 5.

⁸ IX. H. A 7.

⁹ II. de Fin. 33.

¹ l. c. cap. 5.

et 6.

² Praef. ad

Offic. Cicer.

³ Par. 1648. 8.

⁴ Aristot. et

Aelian. Hist.

Anim.

Plutarch de

Solert. Anim.

Id. in Confa-

bulat. Ulyss.

et Grylli.

Porphyr. de

Abstin. lib. 3.

Gell. V. 14.

Sext. Empiric.

Pyrrhonic.

I. 34.

Lactant. III.

10.

Phile de Ani-

malibus.

Ludov. Vives

de Anima,

lib. 2.

Lael. Bisciol.

Hor. Subseciv.

Tom. II. L. I.

c. 4.

J. Euseb.

Nieremberg.

Hist. Nat. I. 3.

⁵ Salmaf. de

Ufuris, cap.

11. pag. 240.

⁶ Sext. Empir.

adv. Mathem.

I. 8. § 286. seq.

Diog. Laert.

VIII. 77.

Porphyr. de

Abstin. ab

Animal. I. 3.

et 4.

⁷ IV. Georg.

219.

⁸ Origen. c.

Celf. lib. 4.

I shall not produce any more Passages of this negligent way of writing; nor shall I draw out the Instances that have been recorded by Historians and Philosophers of some Properties or Functions in the Animal Creation, which have a Relish of the Operations of Justice, and carry with them a Resemblance of Right and Wrong, of Just and Unjust: those *μιμήματα τῆς ἀνθρωπίνης ζωῆς**, as Aristotle⁴ calls them: those *Simulacra Virtutum*, as Cicero⁹. Not because they merit little Attention, (for indeed some Tracts of this Resemblance are very surprizing, more particular in regard to Incest, Adultery and Hospitality) but because all, or most of them, have been industriously collected by Bolognetus¹, Selden, Pufendorf, Rachelius², and others: but more particularly in a very elegant Discourse, published by Hieron. Rorarius de *Rationalitate Brutorum*³. See something more upon that Head in the Authors that I have cited in my Margin⁴.

The Pythagoric Doctrine of the Metempsychosis first broached this Absurdity⁵. And accordingly Empedocles held that there was a Reasoning in Brutes as well as Men, and even a Soul in Plants⁶.

The Stoics helped to propagate it, by maintaining, that there was one great Soul of the Universe, of which the Souls of all Animals, as well of Brutes as of Men, were so many Parts or Emanations, not different or distinct in their Nature (for they all drew from the same Fountain) but varying in the Force of their Operations only, as they happened upon different Organs.

Hence doubtless Virgil:

*His quidam signis, atque haec exempla secuti,
Esse apibus partem divinae Mentis, et haustus
Aethereos dixere. Deum namque ire per omnes
Terrasque, Tractusque Maris, Coelumque profundum⁷.*

And this was Plato's Doctrine before them:

Εἰ μὴ ἄρα διὰ τέτων λεληθότως ἐλέεται ὁ Κέλσος (ὃ γὰρ ἐν πολλοῖς ΠΛΑΤΩΝΙΖΕΙΝ θέλει) ὁμοειδῆ εἶναι πᾶσαν ψυχὴν, καὶ μηδὲν διαφέρειν τὴν τῇ ἀνθρώπῳ τῆς τῶν μυρμηκῶν καὶ τῶν μελισσῶν⁸. †

* *Imitamenta Vitae Humanae.*

† *Ni tamen per haec occulte intelligat Celsus (nam in multis Platonizare capit) uniformem esse omnem animam, et nihil distare hominis ab animis formicarum et apum.*

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In Conformity to this System, the School lately mentioned allowed to the Animal World a set of Passions, as well as to their own Species, not indeed in their full Activity, but something like Shadows and Resemblances, and differing from them but in Degree.

Irasci quidem non magis sciunt [Animalia] quam Ignoscere. Muta Animal a humanis affectibus carent, habent autem similes illis quosdam impulsus.

⁹ Senec. I. de Ira. 3.

Metus autem, Sollicitudinesque, et Tristitia, et Ira non sunt, sed his quaedam similia.

¹ Id. ibid.

——— διὰ τὸ παραπλήσιον τῆς κακίας καὶ ἐκακίαν μὲν, ΟΙΟΝΕΙ δὲ ΚΑΚΙΑΝ ἔσαν ἐν τοῖς τοιοῖσδε τῶν ζώων.*

² Origen. c. Cels. l. 4.

And indeed from that Passage of *Plutarch* to this Purpose, which I have quoted above, upon another Occasion, They allowed as much Reality to the Passions, as to the Senses, of Animals: for they did not even see, but *quasi-videre*.

³ pag. 67.

But the Instances, which have been produced, as so many Expressions above the common Level of Instinct, and implying a kind of Reason, and a Sense of Obligation and Justice, have in great measure, been accounted for by *Selden* and others.

And it is also proper to observe, that two or three transient and extraordinary Acts are not sufficient to establish a Rule and Authority, but the constant and permanent Nature of the whole Species collectively: and to that Abhorrence of Incestuous Copulation in the Camel and the Horse, for which many Writers have been quoted⁴, may be opposed these words of *Ovid*:

⁴ Aristot. IX. H. A. 47. Aelian. III. H. A. 47. IV. 1.

——— *Coëunt Animalia nullo*

*Caetera delectu: nec habetur turpe Juvencae
Ferre patrem tergo, sit Equo sua Filia conjunx:
Quasque creavit, init pecudes Caper, ipsaque cujus
Semine concepta est, ex illo concipit Ales*⁵.

Antigonus de Mirab. C. 59. Varro de R. R. II. 7.

It has been asked, Why then in most Communities are those Animals put to Death, which have been Parties in Acts of Uncleanness?

Avicenna de Nat. Anim. lib. 9.

*But 'twas hard Fate that to the Gallows led
The Dog, that never beard the Statute read*⁶.

⁵ Ovid. X. Metam. 324.

We find this in the *Jewish* Law particularly⁷, and in the Practice, at least, of most Countries at this Day.

⁶ Dryden. Absal. and Achitoph.

And in like manner, the *Bos Cornupeta*, that was the occasion of Death, was to be stoned by the same Law⁸.

⁷ Levit. XX. 15, 16.

⁸ Exod. XXI. 28.

* ——— propter similitudinem quam habet ad malitiam, et istam non ipsissimam malitiam, sed quasi-malitiam, quae in hujusmodi animalibus cernitur.

So *Plato* would have a Formal Process drawn out against Beasts, that should be guilty of Murder. *Επεξίτωσαν οἱ προσήκοντες τῷ φόνει τῷ κτείνοντι*.*

* de Legg.
lib. IX.

In answer to the second Instance, it has been often answered, it was not *propter Jus violatum*, but partly to punish the Negligence of the Owner: which seems to be the Spirit of the Roman Law also, *si QVA-*

¹ See C. 9. 1. *DRUPES PAVPERIEM FECERIT* ¹.

1.

And to the former, the natural Answer seems to be: That all Memory of a Fact so abominable might be abolished, as far as human Industry could reach.

Quaeritur, quomodo sit reum Pecus, cum sit Irrationabile, nec ullo modo capax Legis est? — Pecora inde credendum est jussa interfici, quia tali flagitio contaminata indignam refricant facti memoriam ².

² Augustin.
apud Gra-
tian. caus. 15.
qu. 1. 4.

But no Argument can be drawn from this Practice, any more than from that ridiculous Law in the Athenian Constitution, where if a Man's Blood had been shed by a Stick or Stone, or any inanimate thing, That immediate Cause of Death was formally carried out of their Dominions, and doomed to a kind of perpetual Banishment.

Εάν λίθος, ἢ ξύλον, ἢ σίδηρος, ἢ τι τοιῶτον ἐμπεσὼν πατάξῃ, Ἐ τὸν μὲν βαλόντα ἀγνοῇ τις, αὐτὸ δὲ εἶδῃ καὶ ἔχῃ τὸ τὸν φόνον ἐργασμένον, τέτοις ἐνταῦθα λαγχάνειναι ³. † So much for the Process.

³ Demosth. c.
Aristocr.
T. III.
Ed. Cant.
pag. 283.
⁴ Aeschin. c.
Ctesiph. Edit.
Cant. Tom. II.
pag. 4. 9.
Add. Plat. de
Legg. l. IX.
Pausan. in
Eliac. Lib. II.
C. 11.
in Attic. C. 28.
Pollux. VIII.
10.
Petit. Legg.
Attic. p. 628.
⁵ II. de Ira. 26.

Τὰ μὲν ξύλα, καὶ τὰς λίθους, καὶ τὸν σίδηρον, τὰ ἄφωνα καὶ ἀγνώμονα, εἰάν τινα ἐμπεσόντα ἀποκλέανῃ, ὑπερορίζομεν ⁴. †

Perhaps *Seneca* had this in view:

Atqui ut his irasci dementiae est, quae anima carent, sic et mutis animalibus, quia nulla est Injuria, nisi a consilio profecta. Nocere itaque nobis possunt, ut Ferrum aut Lapis; Injuriam quidem facere non possunt ⁵.

For it is plain from the best and most serious Philosophers, that they never maintained in its absolute Extent, that Brutes were capable of these Considerations, or determined by the Law of Nature.

Societatis autem vinculum est Ratio et Oratio, quae docendo, discendo, communicando, disceptando, judicando conciliat inter se homines, conjungitque naturali quadam societate. Neque ulla re longius absumus a Natura Ferarum: in quibus inesse Fortitudinem saepe dicimus, ut in Equis, in Leonibus: Justitiam, Aequitatem, Bonitatem non dicimus ⁶.

⁶ Cic. I. Offic.
16.

* *Propinqui [bestiam] quae interficit, ream caedis agunt.*

† *Si Lapis, aut Lignum, aut Ferrum, aut tale quippiam delapsum percusserit, atque aliquis a quo id conjectum sit, ignoret, ipse vero norit et habeat telum quo caedes facta est, his rebus in hoc loco iudicium dicitur.*

‡ *Nos Ligna et Lapides et Ferrum, quae Voce et Mente carent, siquem delapsa occiderint, exterminamus.*

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Et quo modo Hominum inter Homines Juris esse vincula putant, sic Homini nihil Juris esse cum Bestiis⁷.

⁷ Id. III. de Fin. 20.

Honestum exsurgit ex pulchritudine, constantia, ordineque in consiliis et factis, quae in bruta animalia non cadunt⁸.

⁸ Id. I. Offic. princ.

Sed inter Hominem et Belluam hoc maxime interest, quod haec tantum — Sensu movetur — Homo autem Rationis est particeps⁹.

⁹ Id. I. Offic. 4.

Vt in arctum quae dicta sunt contraham, omnia suo bono constant, Vitem fertilitas commendat, sapor vinum, velocitas cervum. Quare fortia dorso Iumenta sint, quaeris? quia eorum hic unus est usus, sarcinam ferre. In Cane Sagacitas prima est, si investigare debet feras; Cursus, si consequi; Audacia, si mordere et invadere. Id in quoque optimum est, cui nascitur, quo censetur. In Homine optimum quid est? Ratio. Hac antecedit Animalia, Deos sequitur. Ratio ergo perfecta proprium Hominis bonum est. Caetera illi cum Animalibus Satisque communia sunt¹.

¹ Senec. Epist. 76.

Νόμῳ μὲν γὰρ ἡ δικαίῳ πρὸς ἀνθρώπους μόνον χρῆσθαι πεφύκαμεν².*

² Plutarch in Caione Maggiore.

Τόνδε γὰρ ἀνθρώποισι νόμον διέταξε Κρονίων,
Ιχθύσι μὲν ἔθνησι ἡ οἰωνοῖς πετεηνοῖς,
Ἑδεῖν ἀλλήλους, ἐπεὶ ἡ δίκη ἐστὶν ἐπ' αὐτοῖς,
Ἀνθρώποισι δ' ἔδωκε δίκην³.†

³ Hesiod. Oper. et Dies. * 276.

Separat hoc nos

*A Grege Mutorum, atque ideo venerabile soli
Sortiti ingenium, divinorumque capaces,
Atque exercendis capiendisque artibus apti,
Sensum a coelesti demissum traximus arce,
Cujus egent prona et terram spectantia. Mundi
Principio indulgit communis conditor illis
Tantum Animas, nobis Animum quoque, mutuus ut nos
Adfectus petere auxilium, et praestare juberet,
Dispersos trahere in populum, migrare vetusto
De nemore, et proavis habitatas relinquere sylvas,
Aedificare domos, laribus conjungere nostris
Tectum aliud, tutos vicino limite somnos
Vt collata daret Fiducia, protegere armis
Lapsum, aut ingenti nutantem vulnere civem⁴.*

⁴ Juvenal. XV. Sat. 142.

* Ad Legem enim et Justum cum Hominibus solummodo exercendum Natura facti sumus.

† Hanc etenim Hominibus Legem instituit Jupiter,
Vt Pisces quidem, et Ferae, et Volucres
Se ipsos comederent, quoniam Justitia apud illos non est,
Hominibus autem Justitiam dedit.

And

VLPIAN'S DEFINITION OF

And this has been maintained not only by the Philosophers, but also the Lawyers, *Vlpian* in particular, whose unguarded Definition of *Jus Naturae* has ministered occasion for this Debate.

VLPIANVS AD EDICTVM.

SI QVADRVPE PAVPERIEM FECISSE DICETVR. *Ait Praetor, PAVPERIEM FECISSE. Pauperies est damnum sine injuria facientis datum. Nec enim potest Animal injuria fecisse, quod sensu caret*⁶.

⁵ D. 9. 1. 3.

What is here to be understood by *SENSVS* is plain from *Justinian*, viz. not Sensation, or the ordinary use of the outward Senses, but a Sense of Right and Wrong, the Moral Sense, the Apprehension of Justice and Injustice.

*Satis crudele nobis esse videtur, eum, qui non sentit, ingratum existimari*⁷. In the case of an Infant.

⁷ C. 3. 28.
33. fin.

To constitute an Inquiry, there must be a Determination of the Will, a Concurrence of the Understanding, a *Dolus malus*.

*Sane sunt quidam qui facere non possunt [injuriam] ut puta Furiosus, et Impubes, qui doli capax non est — cum injuria ex affectu facientis consistat*⁸.

⁶ D. 47. 10. 3.
2.

*Vi bonorum raptorum Actio in Impuberem, qui Doli mali capax non est, non dabitur*⁹.

⁹ D. 47. 8. 2.
19.

And here it may not be improper to inquire what the Ancients, the Lawyers particularly, meant by *Dolus malus*, and, what that Distinction leads us to consider, by *Dolus bonus*. Of which see more fully *Rittershusius*¹, *Otto*², *Noodt*³, *Muretus*⁴, *Reitzius*⁵, and Writers upon the Digests⁶.

¹ VI. Sacr.
Lect. 3.
² Dissert. de
Dolo bono.

³ De Forma
emendandi
Doli mali,
Cap. 1. et 2.

⁴ XVIII. Var.
Lect. 4. VI.
18.

⁵ De Ambiguis
etc. v. ANTI-
QVVS. DOLVS.
⁶ ad Lib. IV.

⁷ Tit. 3.

⁸ D. 4. 3. 1. 3.

⁹ Ter. Eunuch.

III. 3. 9.

⁹ IV. 11.

Dolus, like many other Words among the Greeks and Latins, is what they call a *Vox media*, a word of a middle or indifferent Signification, and to be determined by its Adjunct, or other Circumstances.

*Non fuit contentus Praetor Dolum dicere, sed adjecit malum: quoniam Veteres Dolum etiam bonum dicebant, et pro Solertia hoc nomen accipiebant*⁷.

*Dolo malo haec fieri omnia*⁸.

Upon which *Donatus* observes: *Quod autem addidit malo, aut ἀρχαῖος ἐστὶν, quod sic in XII. Tab. a Veteribus scriptum: Aut Epitheton Doli est perpetuum: Aut Diastole est, quia est bonus, quo a medentibus falli aegros, non tamen decipi, Lucretius Poeta⁹ testatur.*

Of his three Reasons, the last is the true one.

THE LAW OF NATURE.

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As *Chrysostom* writes ²:

² de Sacerdot.
II. init.

ΟΤΙ ΜΕΝ ἔν' ἔστι ἘΠΙ ΚΑΛΩ τῇ τῆς ΑΠΑΤΗΣ κεχρησθαι δυνά-
μει, μᾶλλον δὲ, ὅτι μὴδὲ ἀπάτῃ δαῖ τὸ τοιοῦτο καλεῖν, ἀλλ' ΟΙΚΟΝΟ-
ΜΙΑΝ τινὰ θαυμασιωτὴν, ἐνῆν μὲν καὶ πλείονα λέγειν. *

See the Artifice of the Physician, which he alludes to, at the End of the first Book.

The Passage of the XII. Tables, hinted at by *Donatus*, is this:

SI TVTOR DOLO MALO GERAT VITVPERATO.

It is not strange or uncommon, that many words should be found in Language of this neutral Situation, whose precise Meaning must be adjusted from something without.

Such is *Venenum*, and Φάρμακον,

Qui venenum dicit, adjicere debet, utrum malum an bonum —

Φάρμακα πολλὰ μὲν ἰδὲλὰ μεμιγμένα, πολλὰ δὲ λυγρὰ ³. †

³ D. 50. 16.
236.

So *Persuadere*:

Odyss. IV.
230.

Persuadere est plus quam compelli, atque cogi sibi parere. Sed Persuadere τῶν μέσων ἐστίν, id est, ex mediis (sc. verbis) est. Nam et bonum consilium quis dando potest suadere, et malum ⁴.

⁴ D. 11. 3. 1. 3
Gothofred. ad
loc.

Scaevam volgus quidem et in bona et in mala re vocat, cum aiunt bonam et malam scaevam ⁵.

⁵ Festus.

Nequid obsit bonae scaevae causa ⁶.

⁶ Varro.

Bene ego ab hoc praedatus ibo, novi, bona scaeva est mihi ⁷.

⁷ Plaut. Pseud.
IV. 7. 39.

This is a very extraordinary use of Language. As the Greeks, in their Auspices, turned their Faces northwards, and the Romans southwards, what was *Left* to one People, was *Right* to the other ⁸. This Amphibology, as either Hand might be lucky or unlucky, produced the *bona Scaeva* considered in the Greek Situation, and *mala Scaeva* in the Latin. For East was the lucky Point, and West the contrary.

Add. Turneb.
VIII. Advert.
11.

Of this sort are *Tempestas*, *Valetudo*, *Facinus*, *Periculum* ⁹, *Contagium* ¹. So we say, *Fides bona et Fides Mala*; *Bona et Mala Gratia*. And *Plautus* has *Malitia Mala* ², somewhat extravagantly.

⁸ But see
Dionys.
Halic. II. 5.

⁹ Gell. XII. 9.

¹ Gifan. Con-
lectan. ad
Lucret.

This ambiguous use of *Dolus* about which we are principally concerned, is very ancient. *Homer* has δόλῳ κακῷ and κακοῖσι δόλοισι ³. Upon which *Eustathius* observes: πρὸς διαφορὰν καὶ τῶν ΔΟΛΩΝ ΕΤΕΡΩΝ ΑΓΑ-
ΘΩΝ, οἷς ἐπιμένεως ἂν τις κοσμοῖτο. †

² Aulul. II. 2.

³ 38.

³ Iliad. IV.

339.

* Proinde quod fraudis vim atque usum bonam etiam in partem adhibere possis, seu, ut verius dicam, quod ne fraudis quidem, sed admirandae cujusdam dispensationis nomine tum fraudis ea designanda sit, pluribus quidem hic a me exemplis doceri poterat.

† Pharmaca multa quidem bona mixta, multa autem mala.

‡ Ad differentiam usurpatur aliorum bonorum dolorum, quibus laudabiliter aliquis ornaretur.

* III. Argonaut. 89.

So Apollonius Rhodius*:

—ἐπεὶ δολέεσσα τέτυκται.*

And the Scholiast upon the place notes:

Δολέεσσα, ἀντὶ τῆς φρονίμης. Ἐστὶ γὰρ ποτε ὁ Δόλος καὶ ἐπὶ τῆς φρονήσεως.†

These Instances, I say, are very extraordinary. But what I have to add, may seem much more so. For I think *Probare* may be reduced to this Class.

Of *Timoleon*, who killed his Brother conspiring against his Country, in Vita init. it is said by *Corn. Nepos*⁵:

Hoc praeclarissimum ejus facinus non pari modo probatum est ab omnibus. Nonnulli enim laesam ab eo pietatem putabant.

This Act of *Timoleon* was looked upon by different People in different lights.

It is still perhaps more remarkable, that *Honor* should be in this Class: but so it was. Of which the words of *Gellius*⁶ are a Proof: and the whole Passage being for my present Purpose, I shall here transcribe it.

Est plurifariam videre atque animadvertere in veteribus scriptis pleraque vocabula, quae nunc in sermonibus vulgi unam certamque rem demonstrent, ita fuisse media et communia, ut significare et capere possent duas inter se res contrarias. Ex quibus quaedam satis nota sunt, ut tempestas, valetudo, facinus, dolus, gratia, industria. Haec enim fere jam vulgatum est ancipitia esse, et utroque versus dici posse. Periculum etiam, et venenum, et contagium non, uti nunc dicuntur, pro malis tantum dicta esse, multum exemplorum hujusmodi reperias. Sed Honorem quoque mediam vocem fuisse, et ita appellatum, ut etiam malus honos diceretur, et significaret injuriam, id profecto rarissimum est. Quintus autem Metellus Numidicus in oratione, quam de triumpho suo dixit, his verbis usus est. Qua in re quanto universi me unum antistitis, tanto vobis, quam mihi majorem injuriam atque contumeliam facit, Quirites: et quanto probi injuriam facilius accipiunt, quam alteri tradunt, tanto ille vobis, quam mihi, PEIOREM HONOREM habuit.

⁷ Aristot. I. Polit. 2. V. Ethic. 10. Plutarch. de Solert. Anim.

Jus therefore, properly and strictly speaking, is not to be understood, where Reason is not supposed⁷.

And therefore those who write more correctly, consider these Operations of Brutes, as *Vis Naturae*, not *Jus Naturae*.

* Quoniam dolosa est.

† Δολέεσσα, id est, Prudens. Est enim Dolus aliquando pro Prudentia.

And

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And by this *Law* or *Power* of Nature, Beasts are prompted to exert those Acts, which support themselves and their Species: and to decline all things which would turn to their Disadvantage.

And when they act under this Principle or Impression of Providence, there is no more Idea of Justice, or Moral Obligation in it, than there is in the Vegetable World, in the Shoots of Trees, or any other Motion or Action of Natural Bodies.

The Mistake of *Vlpian* seems to arise from an improper use of the words *Jus* and *Lex*: which has occasioned a Confusion of Natural and Moral Causes.

So in Physics we talk of the First, Second, and Third, *Law of Nature*.

*Continuo has Leges, aeternaque foedera certis
Imposuit Natura locis*⁸.

———*Magnisque agitant sub Legibus aevum*⁹.

———*Legem defendere cuncti*¹.

So *Seneca*,

*Ausus Tiphys pandere vasto
Carbasa Ponto, Legesque novas
Scribere Ventis*².

*Accepit Mundus Legem: dedit arma per omnes,
Admonuitque sui. Vitulus sic namque minatur,
Qui nondum gerit in tenera jam cornua fronte*³.

*Non nos causa Mundo sumus biemem aestatemque referendi. Suas ista
Leges habent, quibus divina exercentur*⁴.

*Legem Barbae et Canorum nondum natus Infans habet*⁵.

Thus, when *Tully* writes, as quoted above⁶: *Earum Bestiarum quaeque suum tenens munus manet in Lege Naturae*, He may be understood, that Providence, for the better Government of the Natural World, has appointed such and such *Rules* to be observed in it: has implanted such Appetites, Inclinations and Instincts in the race of Animals, that, by acting agreeably to these Impressions, every one in their Turn, like the Stars in their Courses, may keep up the ORDER AND STANDING RULES OF NATURE⁷.

And indeed the true Answer to this Difficulty occasioned by *Vlpian*, is to be found in these last Reflections. If this Maxim of Law were but properly attended to, the whole business would be easily concluded:

QVOD NATVRALITER FIT ID NON PROTINVS IVRE FIT.

For as Law or *Jus* is concerned in the Application of Justice, and as Justice is the Act of a Reasonable Mind, it is as impossible to conceive

Q

Jus

⁸ Virg. I.
Georg. 60.

⁹ Id. IV. 54.

¹ Valer. Flacc.
I. 213.

² Medea,
Act. II. 318.

³ Ovid.
Halieut. ini.

⁴ Senec. II. de
Ira. 27.

⁵ Id. III.

Quaest.
Natur. 29.

⁶ pag. 112.

⁷ Bolognet. de
Jur. et Aequit
Cap. 2.

UPLIAN'S DEFINITION OF

Jus without Reason, as to conceive Justice without it. And consequently, if no *Jus*, then no *Jus Naturale*.

Thus the Acts of a Madman, or a Minor, though done *naturaliter*, considered as Facts, are however not obligatory, for want of this necessary Faculty of Reason, which in the one is extinguished, in the other is not mature.

And this is what the Lawyers mean, when, accounting for this Difficulty, They say, that *Jus Naturae* does *cadere in Bruta*, or *pertinere ad Bruta materialiter*; but to Man, *formaliter*.

That is, the Subject *Matter*, the Act or Operation is common to both: but Man alone by Reason, is capable of giving it the *Form*, the Figure or Fashion of Law, of Right and Wrong. Though there are *natural Acts* in both (and those similar ones), it follows not that there is *natural Law* in both.

If a Man partakes, in some part of his natural Functions, with the Vegetable World, is it a Consequence, that these natural Functions must produce a Law in both Species?

The Law of Nature with regard to Man, according to *Grotius*, is not affected in this Dispute. Nor is it of great Moment, if in the Rules prescribed him in this Law, there are some Acts, which belong to his particular Nature and Circumstance, and others, which are performed by him in common with the other part of the Animal Creation:

Non quo dissimilis res sit, sed quo is qui facit,

*Ter. Adelph. according to the Poet^s.
v. 3. 39.

These are Laws which lay a considerable Obligation upon Man, had the Mute Creation *acted* with him, or not. For that affects not Him, nor the Consideration of Law and Justice.

There are two Points confessedly, wherein both Natures are conceived to concur in their Operations, and those are, 1. The Preservation of the Individual, attended with all those Acts which contribute to it, and 2. The Continuation of the Species.

As for the first, the Suggestions of Nature prompt every Animal to guard his Existence; and to repel all those Attacks, which bring, or seem to bring, it in Danger. And with Brutes here it ends. They take not into the Reckoning the Nature and Circumstance of the Violence offered them: whether it be for their Good, or meant for their Destruction: whether it is applied for their Relief and Preservation, or intended for their Damage and Extinction. Nor, in the second place, is it proportioned to the Attack, that is made upon them, but generally the Warmth and Vigor of Resistance is circumstanced by the Strength or Inability of the Animal which suffers. With Men the Principle is the same, the Legal Effects are different:

Senec. II. de
Ira. 16.

Animalibus pro Ratione Impetus: Homini pro Impetu Ratio^o.

For

For both the Law of Nature and the Civil Law have set Bounds and Regulations, in Mankind, to this quick Apprehension, and this Dictate of Nature. For were we to defend ourselves, or repel any Violence that is offered us *more belluino*, what would become of Society?

And, in order therefore to draw out what the Emperor very properly calls, *Moderatio inculpatæ Tutelæ*⁹, Civilians have agreed to mark out the Rules of Self-Defence by the Consideration of many¹ Circumstances not taken into the Account, when this natural Act is exerted by the Animal Species.¹ Grot. II. 1. Pufendorf, II.

Again. The Union of the Sexes is the same *materialiter* in every Species of Animals, and the Desire of it implanted for the same Purposes: yet in Man this is invested, and attended with Rights, Laws and Properties, to which the Animal World is a Stranger.⁵ Hoppius ad Inst. Lib. IV. Tit. 3.

What is *materially* the Subject in both, in one is the *Formal Ratio* of several Principles, which include the Idea of Right and Wrong, and have a legal Effect and Obligation.

Thus, with Mankind, it is something more than a bare Mixture. It is defined to be *Divini et Humani Juris Communicatio*². *Individua Vitæ Consuetudo*³.² D. 23. 2. 1. ³ J. 1. 9. 1.

It is in all respects a Contract.

*Nuptias non Concubitus, sed Consensus facit*⁴.

And last of all, the Civil Law of the Romans considers it as the Foundation or Title, by which is acquired the *Dominium Parentale*, or *Patria Potestas*.⁴ D. 50. 17. ^{30.} Add. D. 24. ^{1.} 32. 13.

Nothing of all which attends the natural Act in the Mute Creation, which is therefore by *Vlpian* very erroneously said *Censeri peritia Juris Naturalis*.

So that upon the whole, all Estimation of Law, and the Imputability of Right and Wrong, must be grounded upon the Supposition of Reason. Thus the Lawyers argue in similar Cases. For in Cases, where Reason has no Share in the Question, this Maxim is produced,

Error Jus non facit

in Conformity to these two Laws:

*Quod contra Rationem Juris receptum est, non est producendum ad consequentias*⁵.

⁵ D. 1. 3. 14.

*Quod non Ratione introductum, sed errore primum, deinde consuetudine obtentum est, in aliis similibus non obtinet*⁶.

⁶ l. 39. cod.

All that has been said to *Vlpian's* Definition will appear much stronger when I go farther, and add in the next place:

QVOD NATVRALI RATIONE FIT ID NON CONTINVO
FIT NATVRALI IVRE.

Q 2

Or,

Ulpian's DEFINITION OF

Or, in other words,

Aliud est obligari naturaliter : aliud obligari Jure Naturae.

This is supported in this manner : if the Reasonableness of an Act is sufficient of itself to enforce an Obligation, then it holds, that wherever a Reasonableness is given, an Obligation must follow. For it would be absurd to say, that Obligation is necessarily produced by Reasonableness, and yet Reasonableness shall subsist without producing Obligation. Yet how often do we find the clearest Dictates of natural Reason ineffectual towards laying us under a necessity of acting ? which they could not be, if Obligation derived all its Vigour and Powers from natural Reason.

What is so agreeable to the equitable Sentiments of Mankind, as the Performance of Covenants ?

Hujus Edicti Aequitas naturalis est. Quid enim tam congruum Fidei humanae, quam ea, quae inter eos placuerunt, servare⁶.

⁶ D. 2. 14. 1.
pr.

And yet there is another and more particular Reason, why *all* Covenants should not bind. As again in the case of Minors, whose want of Judgment exempts them from the Effects of Obligation in any Contracts or Transactions, interposed without the Guardian's Concurrence.

Quod Pupillus sine Tutoris auctoritate stipulanti promiserit, solverit, Repetitio est : quia nec Natura debet⁷.

⁷ D. 12. 6. 41.

Pupillus mutuam pecuniam accipiendo ne quidem Jure Naturali obligatur⁸.

⁸ D. 44. 7. 59.

Here the general Reasonableness still subsists, and no Obligation produced.

This has led some Lawyers to distinguish between *Natural Obligations*, and *Obligations of Natural Right*.

Natural Obligations (or those Instances, where a Man may be said *obligari naturaliter*) are such, where the word Obligation is used improperly, or such kind of Obligations as are consequent upon imperfect Rights.

⁹ D. 46. 3. 95.

4.

¹ D. 35. 2. 1.

17.

It is an Obligation, *quod vinculo Aequitatis solo sustinetur⁹*. Cannot therefore be sued : *Quod Natura debetur, peti quidem non potest¹*. And is deemed rather a Contemplation of natural Fact, than an Apprehension of strict Law.

Nec servus quicquam debere potest, nec servo potest deberi. Sed cum eo verbo abutimur, Factum magis demonstramus, quam ad Jus referimus obligationem².

² D. 15. 1. 41.

So I rather chuse to read, with a very eminent Civilian, not *Jus Civile*, as the Text stands now : because *Factum* is the Term of Opposition to all *Law* in general, as well Natural as Civil.

I observed just above, that it is that kind of Obligation, which we attribute to a less perfect Right, the Tye of Humanity, that is, the *natural* Tye of it, for it has no *legal* one. And this has been farther illustrated before in the Chapter concerning Justice.

It is not unusual to borrow this word, when we understand nothing of a *Vinculum Juris*. Thus in conferring a Favor, We scruple not to say that We have laid such or such a Man *under an Obligation*. That is, *He is naturally obliged to us*. And this is the Language which the Civilians make use of. So *Vlpian* concerning the *Bonae Fidei Possessor*:

*Quemcumque sumptum fecerint, ex hereditate, siquid dilapidaverunt, perdiderunt, dum re sua se abuti putant, non praeſtabunt: nec si donaverint, locupletiores facti videbuntur, quamvis ad remunerandum sibi aliquem naturaliter obligaverunt*³.

³ D. 5. 3. 25.

*Parens, quamvis ali a filio Ratione naturali debeat, tamen aes alienum ejus non esse cogendum exsolvere filium, rescriptum est*⁴.

¹¹.

⁴ D. 25. 3. 5.
¹⁶.

It must not be omitted, that the Idea of Natural Obligation is not tyed down to such Facts alone, as include an imperfect Right: it was meant to comprehend such Negotiations and Transactions also, where Consent and Reciprocal Concurrence was understood; such namely as wore the Shape and Form of regular Contracts, but where the seeming Contractor had not a legal, civil Capacity to make them. Such were the Stipulations of a Slave, the Engagements of a Minor, &c.

Nor must it be forgot, that all these obtained the name of *Obligations*, not intirely in the hard and unnatural Sense which I considered above. For indeed, in some measure, they may be said to be obligatory. In many instances namely, if this natural Debt or Bond was cancelled, and this Contractor fulfilled his Engagements, there was no legal Recovery, no Relief for Pleas of Error or Fraud: but He was constrained to stand to his Discharge, though he was not to his Contract.

I am sensible, that this Doctrine of Natural Obligations does not come up exactly to my point. In the Eye of the Roman Law, it regarded only the Distinction that was observed between Man in his Natural, and Man, in his Civil Capacity: it comprehended such Facts, as *nullum Juris haberunt exitum*, were not productive of a Civil Action, and could not be sued or recovered by a Legal Process. Obligation with the Civilians set out upon Compact, began at the Law of Nations, was perfected by positive Institutions, but was a Stranger to any State and Condition of Life besides. However, these Considerations have thus far availed me, that my Reader, in answer to *Vlpian*, may observe how little Strefs, what a small Load of Obligation, the Roman Law has laid upon *Natural Actions alone*, even those of the Human Species. I would carry it somewhat farther, and observe from hence (call it Comparison or Illustration) that neither the Reasonableness, the Utility, the Propriety, I shall not be thought

thought to say too much, when I add, not even the natural Equity of the Action, considered abstractedly, is capable of founding an Obligation. Though I differ from these Lawyers, when I maintain, that I can conceive an Obligation antecedent to the mutual Consent of Mankind, yet I agree with them when I affirm, that the Fairness of the Subject proposed is not able to produce it.

Where therefore must we look for the *Obligation* which Every Man is under, for the Performance of his *Natural Duties*? If legal Necessity must come from a superior and directing hand: if there be not that Superiority or Controul, though great Fitness and Convenience, in the Relation between my natural Duties and my natural Condition; then I can gather, that a Being of infinite Wisdom, who contrived that Fitness, should be willing to demand the Execution. Here therefore is all that the modern Writers upon this Subject⁵ can expect from me (it is all that I can allow them) when they talk of the internal Obligation which is laid on us by Reason, and the more cogent one from Without, or the Will of a Superior. The Directions of Natural Law are in their own Nature, what a wise Man would make his Preference; but edged with an Obligation, they are now what a conscientious Man would make his Duty. I agree with them, that *from the Agreement and Concurrence of these two Considerations* (I cannot call them *both* Obligations) *arises the highest Degree of Moral Necessity*. I look upon Reason, with Pufendorf, not as a Law itself, but as a Means, by the Application of which, the true Law of our Nature may be discovered. So that Natural Reason promulges, what the Author of Nature enjoins.

⁵ Barlamaqui,
1. 6. 13.

Thus the Emperor calls the *Jura Naturae, divina quadam Providentia constituta*⁶.

⁶ J. 1. 2.
penult.

*Quorum Deus Inventor, Disceptator, Lator*⁷.

⁷ Cic. de
Repub. apud
Lactant. VI. 8.

Θεῶν νόμοι⁸. *

⁸ Xenoph. IV.
Memorab.

*Quid aliud est Natura, quam Deus et divina Ratio*⁹?

⁹ Senec. IV. de
Benef. 7.

And such, in great measure, is the Definition of *Grotius*, when taken in its fullest Latitude, and comprehending, what some Editions of that Author have torn from it, *viz.*

Natural Law is the Rule and Dictate of Right Reason, shewing the moral Deformity or moral Necessity there is in any Act according to its suitability or unsuitability to a Reasonable Nature:

AND CONSEQUENTLY, THAT SUCH AN ACT IS EITHER FORBID OR
¹Grot. I. 1. 10. COMMANDED BY GOD, THE AUTHOR OF NATURE¹.

* *Dei Leges.*

THE

T H E L A W of N A T I O N S.

Grotius.

Selden.

Pufendorf.

Fulbeck's Pandect of the Law of Nations. Lond. 1602. 4.

Zentgrave de Origine, Veritate et Obligatione Jur. Gentium.

Maevii Prodromus Jurisprudentialiae Gentium communis.

Stralsf. 1671. 4.

S. Rachelius de Jure N. et G. Kilon. 1676. 4.

J. Wolfgang. Textoris Synopsis Juris Gentium. Basil. 1680. 4.

WHEN I consider the *JUS GENTIVM*, I need not acquaint my Reader, that I do not mean by it any of these following:

1. As it was apprehended by *Harmenopolus*¹:

¹ Prompt. J. C.
I. 1. 15.

Εθνικὸς νόμος ἐστίν, ὅστις ἐθνῶν ἐν, ἢ ἔθνη χρῶνται τινὰς, οἷον τὸ μὴ μίγνυσθαι ταῖς μητρῶσι παρὰ Σαύραις καὶ Ἑλλησι, καὶ τὸ ἐναντίον, τὸ μίγνυσθαι ταύταις παρὰ Πέρσαις. *

Or, 2dly, that it stands to distinguish between Civilized States and the uncultured Barbarians, who are directed by no Law or Principle, according to that of *Pfellus*².

² in Synopsi
Legum.

NOMIMON ΕΘΝΙΚΟΝ ἐστίν, ἐχὼν τὸ Βαρβαρῶδες.

Τὸ γὰρ τῷ ἔθνει ὄνομα νομικῶς εἰρημένον

Γενῶν συλληπτικόν ἐστὶ νόμοις ὑποκειμένων. †

* *Gentium autem Jus est, quo Gens Gentesve utuntur. Vt non misceri matribus apud Sarmatas et Graecos, contraque iis misceri apud Persas.*

† *Jus Gentium est, non illud quod est Barbaricum. Scilicet Gentis nomen legitime hic acceptum. Eas nationes complectitur quae legibus subsunt.*

Nor,

THE LAW OF NATIONS.

Nor, lastly, that Sense, in which it is used by *Livy*,

*Irent, crearent Coss. ex Plebe, transferrent auspicia quo nefas esset: Potuisse Patres plebiscito pelli honoribus suis: num etiam in Deos immortales inauspicatam Legem voluisse? vindicasse ipsos suum numen, sua auspicia, quae ut primum contacta sint ab eo, a quo nec Jus nec Fas fuerit, deletum cum duce exercitum documento fuisse, ne deinde turbato Gentium Jure Comitia haberentur*³.

² VII. 6.

The *Jus Gentium*, or Law of Nations, in the Conception of the Roman Lawyers, differed little from the Law of Nature, nor indeed does it differ in my account of it. The Law of Nations with them was a partial Consideration of the Law of Nature, established upon *Vlpian's* Doctrine, which led them to view Mankind, both as comprehended under the promiscuous⁴ and universal Law of the Animal World, and likewise as the Subject of an higher and greater Obligation, which was peculiar to their better Part, and constituted that *Jus*, quo Gentes Humanae utuntur.

⁴ Grav. II. Ongg. 2, 3.

It was still with them the *Law of Nature*, because from the Lessons of Nature it proceeded; but when it was considered, upon whom that Influence was made, namely, upon one part of the Creation, exclusive of the other which was comprehended in it before, it changed its name, and was

⁵ D. I. I. 1. 4. called the LAW OF NATIONS⁵.

*Quod Naturalis Ratio inter omnes homines constituit, id apud omnes peraeque custoditur, vocaturque Jus Gentium quasi quo Jure omnes Gentes utuntur*⁶.

⁶ D. I. I. 9. fin.

J. I. 2. 1.

⁷ J. 2. I. 11.

*Jure Naturali, quod appellatur Jus Gentium*⁷.

And this is the Reason, as we have seen above, why *Jus Naturae* and *Gentium* are used promiscuously by all Writers, by the Lawyers particularly⁸.

⁸ J. 2. I. 41.

D. 16. 3. 31. pr.

19. 1. 1.

41. 1. 1.

50. 16. 42.

50. 17. 84. 1.

To proceed therefore more accurately. As Law must be either *Natural*, or *Instituted*, viz. such as God prescribes in the Voice of Reason, or such as Man appoints by Civil Sanction, where must we look for the Law of Nations, and to which of these two must it be referred?

To the Law of Nature doubtless, of which it is Part.

For if we consider its Origin, it is the Law of Nature: if the Object or Application of it, it is the LAW OF NATIONS, that unwritten, general, reasonable and clear Obligation, which links separate Communities together, like Individuals. It is still the Dictate of Right Reason, applied to the Wants and Services, the Exigencies and Necessities of Societies. So that what used to be called *Jus Naturae*, becomes *Jus Gentium*.

To speak in the Language of the Schools, it is *Jus Naturae*, ab Origine et Causa proxima, it is *Jus Gentium*, a Subjeeto.

And

And accordingly it has been defined,

Quod inter Populas plures, five Populorum Rectores intercedit, ab ipsa Natura profectum, atque Legibus divinis constitutum.

Ipsum Jus Naturale Vitae hominis socialis, negotiisque Societatum atque integrarum Gentium adplicatum.

For Man may be considered in a *Natural* Capacity, and in a *Social* one. A new Situation will subject him to new Circumstances, and new Obligations. It will raise the *Tale* of his Duties, though the Principle, from whence even those new ones flow, remains one and the same. So that the real, proper and exact Difference between *Jus Naturae* and *Jus Gentium* is, that the first is the Law-of-Nature of Man, in his *Natural*, the other, the Law-of-Nature of Man, in his *Social*, Consideration.

Or thus. The one may be called *Jus Naturae Hominum*, the other *Jus Naturae Civitatum*. This is a competent Distinction introduced by *Hobbes*, and embraced by *Pufendorf* ⁹.

"Natural Law," says that Author, "is either the Natural Law of

"Man, or the Natural Law of States, commonly called the

"Law of Nations. — The Precepts of both are the same.

"But forasmuch as States, when they are once instituted, assume

"the personal Properties of Men; hence it comes to pass, that

"what, speaking of the Duty of *particular Men*, We call the

"Law of Nature, the same We term the Law of Nations, when

"We apply it to *whole States*, Nations or People."

But in order to understand more exactly the Law of Nations, be it observed, that the Law of Nature is very properly divided into *Absolute* and *Hypothetical*. This will lead us to a Distinction of the Law of Nations, that merits Attention, while some others, which have been invented, by *Grotius* particularly, may safely be neglected ¹.

The true and proper Law of Nature obliges *absolutely* all persons, at all times, and in all places, for it is immutable. The other only conditionally, that is, supposing such and such *Conditions* to exist. If those Conditions or Circumstances never exist, nothing is done. But if they are just and reasonable in their own Nature, when they come to exist, the Obligations, which arise from this new System, operate as strongly, as the Obligations of the Law of Nature did in its absolute Force.

Put the Case, that the Law of Nature, or of Reason, does not contradict, or suppose it recommends (which it does very strongly) the Advantages of Society or Civil Communication. Thus, when that Society is formed, and not before, all the Means of maintaining it, and all the Effects that flow from it, are as much the Law of Nature, that is, the *Law of Nature Hypothetical*, as the Rules before it were the Rules of the *Law of Nature Absolute*.

⁹ Hobbes de Cive. C. 14.

§ 4. et 5.

Pufend. II. 3.

23.

Hoppius ad

Inst. Lib. I.

Tit. 2.

¹ Cocceii

Differt.

Praelim. IV.

ad Grot.

THE LAW OF NATIONS.

The Law was natural Law before. The Existence of this Situation only gives it Use and Application. Suppose the Observance of Faith to be a Rule of Nature: when Contracts were introduced by the Law of Nations, no new Law is formed, but an eternal and necessary Law has now a Scene to exert its Operations in.

Therefore, when Writers tell us of a *Secondary Law of Nations*, which in many respects is totally different from the *primary* one, this is the true and natural Observation upon that seeming Disagreement.

If I am directed to cultivate Society, I find there can be none, or, at least, no convenient or lasting one, without a Separation of Property. Separation of Property, on one hand, supposes Contracts, introduces the Ideas of Fraud, of Theft, and several other Violations of that Property. On the other hand, Property introduces Disputes: Disputes are the occasion of War: That brings after it Captivity: That again Slavery, till we come, by the benefit of Manumission, to the Recovery of our natural Condition.

This Scheme has led some People to imagine, that this *Secondary Law of Nations* was a kind of Conventional or Voluntary Law, distinct from the Law of Nature; as it seems indeed, at first sight, to stand in opposition to it.

For, what can appear so contradictory, as the Natural Freedom and Equality of Mankind, and the Introduction of Slavery by the Law of Nations?

*Quae Res a Jure Gentium originem sumpsit: utpote cum Jure Naturali omnes liberi nascerentur, nec-esset nota Manumissio, cum Servitus esset incognita*³.

³ D. 1. 1. 4.

What so contradictory again, as the Notion of having all things in

⁴ D. 1. 1. 5. common, and the Introduction of Property⁴?

Now if the Rights and Duties attending upon this new Scene, are not incongruous to the Law of Nature, strictly so called, but indeed are regulated by it, what is called by the name of a *Secondary Law of Nations* has really no Existence; nor can that be said to be introduced by positive or arbitrary Contracts, or by voluntary Confederacies, which is fairly the Prescription of Right Reason.

It is the *Law of Nature*, says *Vlpian*, *ut qui nascitur sine legitimo matrimonio, matrem sequatur*⁵.

⁵ D. 1. 5. 24.

That could not be the Law of Nature absolutely, under which Dispensation there really was no *Legitimum Matrimonium*; but the Law of Nature conditionally. That is, thus or thus would be the Rule, supposing a *Legitimum Matrimonium*, or a Marriage duly celebrated according to the Form and Ceremony of the Civil Law.

And the same may be observed of the Reverence due from Freed-Men to their Patrons, which the Emperor says, was due by the Law of Nature⁶.

⁶ C. 2. 2. 2.

It is much the same Case, if I enter into Partnership, or any kind of Society, and previously agree to be concluded by what that Society, or a Majority

Majority of that Society, shall determine afterwards to be the Rule of Action. My Obligation here derives its Force, not so much from any Tye which binds me in virtue of this determination of theirs, as from that Necessity, to which I submitted myself in the Condition or Circumstance of Life which I was in before.

To bring this Matter home to the Law of Nations: All the Obligations which arise from what some are pleased to call the *Jus Secundarium*, were virtually laid upon us before, but would never have been known till something arose that called them forth. *The Idea of Abstaining from other People's Goods* was unknown, when we had no Idea of *other People's Goods*.

In other words: the Obligations, which proceed from the Introduction of private, or separate Dominion, prevailed upon general Principles, which lay dormant in the Law of Nature, before the Distinction of *Meum* and *Tuum* was heard of.

Thus *Theft* is said by *Paulus* and by *Ulpian* to be *Natura turpe*⁷. That is, it would be so, after Property was once introduced. For the Doctrine of *Alterum ne laedas* loses no Force upon this Alteration of Circumstance. If therefore another Person detains my Right *per Injuriam*, (for here is a Violation of a Law) I have a Right to demand it, *Jus meum persequi*, and to use those legal Methods for the Recovery of it, which are left me. And if a Nation has a Complaint against a Nation, if the People of *Rome* collectively does *res suas repetere* from the People of any other State, which is supposed for the Purposes I am speaking of, to be in a Condition of Equality, there this Decision of Law is changed into a Decision of War: where the Lives and Fortunes of the contending Parties are staked upon the Issue of this Competition. If the Conqueror, to whom those Lives and Fortunes are forfeited, chuses to accept of the Alternative of their Service, thence arose with the Ancients the Idea of Slavery:

*Servi ex eo appellati, quod Imperatores captivos vendere, ac per hoc servare, nec occidere solent*⁸.

Which, though it be said to be *Constitutio Juris Gentium, qua quis dominio alieno contra Naturam subjicitur*⁹, that is, contrary to the Equality of his Nature, which here He is supposed to wager, yet still, according to *Cicero*, with some little Variation of Expression and Circumstance,

*Non contra Naturam est spoliare eum, quem licitum est necare*¹.

My Reader will observe, that in these Considerations I have in some measure departed from that Distinction I had just before laid down, wherein I looked upon the Law of Nature, as the Law of Individual *Men*, and the Law of Nations, as the Law of Individual *Communities*, if I may so speak. Perhaps it could not be well otherwise; nor, if it could, is it very momentous. An Inquiry into what Authors meant by the Secondary Law of Nation directed me to consider, how that Matter stood with regard to one Man, as well as a Multitude.

⁷ D. 47. 2. 1. 3.
Gothofred.
ad loc.
D. 50. 16. 42.

⁸ J. 1. 3. 3.
D. 50. 16. 239.
⁹ J. 1. 3. 2.

¹ III. Offic. 6.

CIVIL LAW.

WE have seen all Law divided into Natural and Instituted. Instituted, Voluntary, or Positive Law, is the Law of separate Cities: *Jus quod unusquisque Populus sibi ipsi constituit.*

¹ J. 1. 2. 2.

Omnes Populi qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur¹.

² Theophil.

Qui Remp. constituit, eamque legibus ornare cupit, duabus his attendens viis legislationem conficit. Aut enim Leges gentium sancit, quas et Naturales abusive appellamus, aut Civiles, et [eas] vel scriptas, vel non scriptas².

³ D. 1. 1. 6.

Jus Civile est, quod neque in totum a Naturali vel Gentium recedit, neque per omnia ei servit. Itaque cum aliquid addimus vel detrahimus Juri Communi, Jus proprium, id est, Civile, efficitur³.

And hence Cicero defines *Jus Civile*,

⁴ Topic. c. 2.

Aequitas iis constituta, qui ejusdem sunt Civitatis, ad res suas obtinendas⁴.

⁵ Pro Balbo.
§ 13.

Amidst the Variety of human Transactions, our Wants, Situation and Conveniences, one System of Laws suiting one Complexion, and another suiting another, every set of People has been left in great measure at liberty to institute or strike out such a System, as agreed best with their Form of Government, and Manners of their Climate, Time, Constitution, or other Circumstances. *Diffimilitudo Civitatum*, says Tully, *varietatem Juris habeat necesse est⁵.*

⁶ Salmas. de
Vfur. C. 20.

Jus illud Civile, says a great Writer among the Moderns, *partem ex Naturali trahit, quod est generalius, et universo hominum generi conducit, vim et aequitatem eandem ubique Gentium praeferens; partim speciale est, et ex voluntate Legislatoris pendet, qui quid Civibus suis commodum sit, ex eorum moribus et natura aestimans, et ex regionis, quam incolunt, conditione, tales ipsis Leges dat, quas utiles ad eos regendos et sub uno regimine in pace et concordia conservandos prospicit⁶.*

Civil Law therefore is either *MERVM et simpliciter Civile*, mere arbitrary, positive Institutions of a Lawgiver, and such only, as bind from the Sanction given them by his Authority:

Such are *Adeptio*, *Vfucapio*, and several *Leges* and *SCta* of the Romans,

Or,

Or, what may be called *Jus Civile MIXTVM*, where positive Institutions make some Alteration in the Law of Nature, either by adding to it, or taking from it, or else by determining and limiting what by the former Law was indeterminate.

Such are the Laws concerning *Matrimony, Donations, the Power of the Father, etc.*

Quam multa LL. XII. Tabb. Capita, says a good Civilian, ex purissimo Juris Naturalis fonte hausta sunt, quae Juris Civilis dicuntur, quod Civitas Romana ea sibi fecit propria, constituitque. Qualis Dispositio non rem ipsam mutat, sed alienam ei tantummodo induit formam.

And it may not be altogether improper to consider the Law of Nature as a Text, and the Civil Law as a Comment. Of which more below.

So that when *Civil Law* interests itself in *Natural Duties*, great Care should be used towards furnishing the distinct Ideas of each Constitution. If Theft or Adultery should be condemned by the positive Law of any State, and a Penalty annexed to the Transgression: the Law is still Natural Law, the Penalty only Civil, as it is proper and peculiar to that Constitution which inflicts it.

Not that *Property and Peculiarity* is able of itself to constitute the Idea of Civil Law. For instance. The Contract of Buying and Selling, had it been confined to the *proper* and particular Practice of one Country only, as it may, without Absurdity, be supposed; had it been introduced, as it is said to have been, in Ages somewhat late; I say, with all these Marks of Invention, Recency and Appropriation, would yet be classed in the Law of Nature or Nations, of which it is doubtless a Part, and not the Civil Law, to which it does not in its own Nature belong⁷.

⁷ Connan I.
Comment.
Jur. Civ. 5.

And, on the other hand, did all the World *agree* in some positive Institutions concerning the Regulation of this Contract; did Mankind assent to attribute to the Ore, which forms it, one determinate and invariable Valuation over the Face of the whole World, That would nevertheless be esteemed not the Rule of Nature, but an Act of Civil and Voluntary Institution. If all the States upon Earth should, by an accidental Concurrence, appear to speak the Voice of Nature in this Consent of Nations, it would yet be no more than a positive Appointment, the Foundation of it being *arbitrary*, the Universality, only accidental.

For the Purposes therefore and Utility of separate States, *CIVITATES*, was *Civil Law* introduced. *Civitas* is a Society of People thus combining, and thus directed by a Polity of their own contriving; though it is sometimes used improperly, for the local Habitation of this Set of People.

Qui

Qui igitur primi virtute et consilio praestanti exstiterunt, ii perspecto genere humanae docilitatis atque ingenii, dissipatos unum in locum congregarunt, eosque ex feritate illa ad iustitiam atque mansuetudinem transdixerunt. Tum res ad communem utilitatem, quas publicas appellamus, tum conventicula hominum, quae postea Civitates nominatae sunt: tum domicilia conjuncta, quas Vrbes dicimus⁸.

⁸ Cic. pro
Sextio § 42.

And so the old Grammarians: *Vrbs Muros: Civitas ejus Habitatores significat.*

Πόλιν γὰρ ἡμεῖς ἐ τὰ οἰκοδομήματα ἡγόμεθα εἶναι, οἷον τείχη, Ἐῖερά, καὶ νεωσοίκες, ἀλλὰ τὰντα μὲν, ὥσπερ σῶμα τι ἐδραῖον, καὶ ἀκίνητον ὑπάρχον εἰς ὑποδοχὴν καὶ ἀσφάλειαν τῶν πολιτευομένων· τὸ δὲ πᾶν κῦρος ἐν τοῖς πολίταις τιθέμεθα. τέττες γὰρ εἶναι τὰς ἀναπληρῦντας, καὶ διαλύουσας, Ἐῖ ἐπιελῦντας ἑκάστα, καὶ φυλάττουσας, οἷον τι ἐν ἡμῶν ἐκάσῳ ἐστὶν ἡ ψυχὴ⁹. *

⁹ Lucian. de
Gymnas. § 20.

And, upon this Principle, though the particular Law of every State or Country may properly enough be called the Civil Law of that Country, as the Emperor writes:

Jus quidem Civile ex unaquaque Civitate appellatur, veluti Atheniensium: nam si quis velit Solonis vel Draconis Leges appellare Jus Civile Atheniensium, non erraverit: Sic enim et Jus, quo Romanus Populus utitur, Jus Civile Romanorum appellamus¹.

¹ J. 1. 2. 2.

Yet, when We do not make the Addition (as follows in the place last cited) *Quoties non addimus nomen, cujus sit Civitatis*, We always understand the *Roman-Civil Law*; *Jus Romano-Civile*. Just as ὁ Ποιητής with the Greek Writers denotes *Homer*, and ὁ Πήτωρ, *Demosthenes*. And as the Romans expressed their first-rate Poet,

² Terentian.
Maur. y 610.

Sol tibi, velut Poeta signa, quom dicit, dabit².

Or yet more strongly, in the Greek Taste of Expression:

³ Id. 469.

Aut age, inquit ille Vates saepe dixit, aut ubi³.

De Urbanitate est opus ipsum institutum, quam propriam esse nostrae Civitatis ait, et sero sic intelligi coeptam postquam Urbis appellationem, etiamsi nomen proprium non adjiceretur, Romam tamen accipi sit receptum⁴.

⁴ Quintilian.
VI. 3.

And indeed many things contributed to give this City this great Prerogative. When She was Mistress of the World, it was reasonable to suppose,

* Civitatem enim non in aedificationibus inesse judicamus, ut sunt moenia, et templa, et navalia, sed ista quidem, uti corpus quoddam firmum et immobile esse ad receptionem et securitatem Civium. Vim vero omnem penimus in Civibus. Hos enim esse, qui ista impleant, et gubernent, ut perficiant omnia, et custodiant, quale quid id uno quoque nostrum est anima.

that

that no *Civitas*, properly speaking, was to be allowed, besides herself. And this led the Lawyers of that Country, to consider Her, in some measure, as *the only City of the World*.

*Eum, qui vectigal P. R. conductum habet, Publicanum appellamus. Nam publica Appellatio in compluribus causis ad P. R. respicit. Civitates enim in privatorum loco habentur*⁵.

⁵ D. 50. 16. 16.

This Distinction between Rome, and other Cities, had a legal Effect and operation. These were in no regard affected by PUBLIC LAW, but had their Affairs and Interests conducted *jure privato*, and were treated as Individuals. Of which this is a sensible Instance. The *Crimen Peculatus* was only incurred in the Case of Rome and the Treasury there: in all other Instances there lay only the common Action of Larceny:

*Ob pecuniam Civitati subtractam, Actione Furti, non Crimine Peculatus, tenetur*⁶.

⁶ D. 47. 2. 82.

Thus Writers consider the World, as one great State, of which Rome was the Capital. So *Athenaeus*, or his Epitomizer⁷:

⁷ L. 17.

Οτι οἰκουμένης δῆμον τὴν Ρώμην φησί.*

*Illa ipsa Mater Civitatum Roma*⁸.

⁸ Ennod.

Panegy.

Theodoric.

So *Isidore*⁹:

Domus unius Familiae habitaculum est, sicut Urbs unius Populi, sicut Orbis Domicilium totius generis humani est.

⁹ IX. 4. Aed.

Mag. IV.

Miscell. 5.

Muret. XVII.

Var. Lect. 12.

Pithaei II.

Subsiv. 18.

¹ D. 50. 1. 33.

² Il. c. Rullum.

³ in Attic. 3.

In this light of contemplating the Habitable World as one Country, (for in the language of *Modestinus*¹, and of *Cicero* before him², *Roma communis nostra Patria est*) an easy Sense is given to that Passage of *Cornelius Nepos*³, which some Editions, following the wild Imagination of *D. Lambinus*, have miserably polluted.

Primum illud munus Fortunae, quod in ea potissimum Urbe natus est, in quae Domicilium Orbis terrarum esset imperii; ut eandem et Patriam haberet et Domum.

He was a Native of Rome, as well as a Subject of the Empire; *Patria Romanus, Domo etiam Romanus*. For He might have been *Patria Romanus*, though He had been born out of the City. But the Notion of Empire led that Critic to suppose it should be *Dominam*, not *Domum*, which was nothing to the Person of *Atticus*, or the Purpose of *Nepos*.

Upon all these Accounts there is a great Propriety in the Emphasis of *Jus Civile*, when understood of the Roman Law exclusively. And other

* *Romam Mundi esse Populum vere dixit.*

Considerations have not been wanting to support it. The internal Value and Excellence of this System has raised it high in the Esteem of all dispassionate Judges, and in some measure may be said to have left Rome a Mistress of the World, and a Lawgiver to Posterity, even after her Conquests had sunk under Her, and her numerous Provinces had mouldered away into nothing.

Tanta Sapientia fuisse [Roma] in Jure constituendo putanda est, quanta fuit in his tantis opibus imperii comparandis *.

* Cic. I.
de Orat. 44.

Percipietis etiam illam ex cognitione Juris laetitiam et voluptatem, quod, quantum praestiterint nostri Majores prudentia ceteris Gentibus, tum facillime intelligetis, si cum illorum Lycurgo, et Dracone et Solone nostras Leges conferre volueritis. Incredibile est enim, quam sit omne Jus Civile praeter hoc nostrum inconditum, ac pene ridiculum *.

* Id. Ibid.

Ὑπὲρ δὲ ταῦτα πάντα κοσμῶ τῷ πολιεύματι, ὃν ἐκ πολλῶν κατέσχευον παθημάτων [lege μαθημάτων] ἐκ παντὸς καιρῷ λαμβάνοντες τι χρησιμον *.

* Dionys.
Halic. l. i. init.

Armorum Legumque Parens, quae fundit in omnes Imperium, primique dedit cunabula Juris *.

* Claudian.
de laudib.
Stilicon. lib. 3.

His omnibus artibus tanquam vera via nisi sunt ad honores, imperium, gloriam: honorati sunt in omnibus fere gentibus: imperii sui Leges imposuerunt multis gentibus: hodieque literis et historia gloriosi sunt pene in omnibus gentibus *.

* D. Augustin.
V. de C. D. 15.

Roma—per quam Deo placuit orbem debellare terrarum, et in unam Societatem Reip. Legumque productum longe lateque pacare *.

* Id. XVIII.
22.

Nil nisi sanctum ac venerabile nostra Jura custodiunt, et ita ad tantam magnitudinem Romana Majestas cunctorum numinum favore pervenit: quoniam omnes suas Leges religione sapiente, pudorisque observatione devinxit *.

* l. 5. C.
Gregor. tit.
de Nuptiis.

Roma Legum Patria *.

* Justinian.
Nov. 9. pr.

Lex Romanorum, Legum omnium Mater nuncupatur *.

* Capitular.
Imp. Ludovici.

Ad Legem Romanam tanquam ad communem totius Europae prope modum εὐνομίαν omnes confugiunt *.

* Eguinar.
Baro.

Leges Romanae a Justiniano in Epitomen redactae tanta ratione et sermonis venustate, ut nulla sit Natio tam fera, vel ab humanitate abhorrens, quae eas non fuerit admirata *.

* Hector
Boeth.
l. Hist. Scot.
9.

* Praeter haec autem omnia, decore Reip. administrandae, quem ex multis composuerunt perpositionibus [documentis] ex omni occasione arripientes quodcunque utile videretur.

*Ita justum et aequum visum est omnibus Jus Romanum, ut qui Romanis Legibus non tenentur, illud tamen tanquam Aequitati Naturali maxime consentaneum sequantur, et suas Leges per has interpretentur*⁶

⁶ Damhoud
Prax. Rer.
Civ. C. 12.

*Mutuamur a Jure Romano quod et Aequitati consonum, et negotio de quo agitur, congruumque invenitur; non quod usquam subditi fuimus Justiniano M. aut Successoribus ejus, sed quia Jus illo Auctore a sapientissimis viris ordinatum tam aequum est, tam rationabile, ut omnium fere Christianarum Gentium usu et approbatione commune sit effectum*⁷.

⁷ Car. Molin
Praef. ad Con-
suet. Par.

*A Romanis ad omnes populos Juris Faecialis totiusque Justitiae Fontes purissimi manarunt*⁸.

⁸ Bodin. V. de
Repub. 6.

*Hodie Jus Civile Romanorum quasi Gentium quoddam Jus Commune apud totam fere Europam observatur, utique in quibus causis propriae Leges et Consuetudines deficiunt. Sed et ad hujus Juris normam dirigitur Interpretatio quarumcunque Constitutionum ac Consuetudinum, quae illi manifeste non repugnant*⁹.

⁹ Vinn. Com.
ment. ad Iull.

*Quid solidius praeceptis regulisque suis, quas haustas ex honestate Naturae, non confuse digestas, proditasque temere, sed ratione atque via traditas a Majoribus fuisse didicimus? Etenim siquam habet Philosophia dignitatem, habet autem opinione maximam, ea omnis translata fuit in Jurisprudentiam Romanorum, qui partum armis imperium, juris commercio, legumque majestate continuerunt. Quicquid enim a Graecis philosophis de honesto et justo: de finibus bonorum et malorum: de regendis populorum moribus: de legibus et rep. quaestionibus infinite propositis et ambitiosis magis quam utilibus disputationibus effundebatur, totum collectum fuit a Ictis nostris, atque, nugis excussis, traductum in Urbem; ut quod apud Graecos exercitatio erat Ingenii, longiorisque oculi levamen, Romae, in corpus Juris Civilis conversum, publicae ac privatae semen esset utilitatis*¹.

¹ Gravin.
Praef. ad
Orig. J. C.
² De Justitia
Rom. Legum.
Lugd. Bat.
1647. 4.

³ View of the
Civil Law.
Oxf. 1662. 8.

But there is no End of citing Testimonies to this Purpose. My Reader will find many more (if He is not satisfied with these) and the Credit and Superiority of the Roman Law more accurately considered, in many of those Writers, whom I here subjoin: *Jac. Maestertius*², *Sir Tho. Ridley*³, *Dr. Duck*⁴, *Sir Rob. Wiseman*⁵, and the Authors quoted by *Ferriere*⁶.

⁴ De Usu et
Auctoritate
Juris Civilis
per Dominia
Principum
Christianorum.
Lond.
1679. 12.

The Excellency moreover of this System of Law, and the Use of it in those Countries particularly, which are guided by Constitutions of their own, has been discoursed of very largely and expressly by several of those Writers also.

⁵ Excellency
of the Civil
Law. Lond.
1686. 8.

Its immediate Use and Service there, is, that it has been held by the general Consent of all Nations in Europe, as a kind of *Jus Gentium*, or

⁶ History of
the Civil Law,
Cap. 29.

general Law of Nations, for Direction in Cases, where their own Statutes or Customs fail them. So also some of the rigid Canonists have directed, that no Recourse is to be had to the Civil Law in adjusting Ecclesiastical Matters, but where their Canons, Decretals, *etc.* do not assist them.

From the known Equity of it, Application is frequently made to it also, for the *Interpretation* of Statutes and Customs⁷.

To all which may be added its great Utility in Foreign Leagues and Treatises⁸.

In England particularly, where it has its least Effect, it has its Uses.

The Court of Chancery is a Court which proceeds *ex Aequo et Bono*. The Judges and Officers of it were formerly Civilians; and the Process of it by Bill and Answer, *etc.* is the same with the Process in the Courts of Civil Law.

To this may be added the Lord High Constable's and Earl Marshall's Court, for Crimes committed, and Contracts made, beyond Sea; for all Cases of Arms, Honour and Heraldry.

The High Court of Admiralty is directed in Civil Cases by the Roman Law, and the Laws of *Oleron*, or a System of Maritime Laws made in that Island, by *Rich. I.* But the same Court proceeds in Criminal Cases, according to the Practice of the Law of England by 28 *H. VIII. c. 15.*

The Practice of the Ecclesiastical or Spiritual Courts is conducted by a mixed Form of Civil and Canon Law.

And last of all, the Courts of the two Universities by Royal Charter may proceed, and often do, upon the Principles of the Civil Law⁹.

It must not be forgot, that we are told, that the Law of Nature is immutable, and yet that the Civil or Instituted Laws of several Countries are frequently *Additions* to the Law of Nature, or *Deviations* from it. How then shall these two Laws be reconciled? *viz.*

Jus Civile est, quod neque in totum a Naturali, vel Gentium, recedit, nec per omnia ei servit. Itaque cum aliquid addimus, vel detrahimus Juri Communi, Jus proprium, id est, Civile, efficitur¹.

Civilis Ratio Civilia quidem Jura corrumpere potest: Naturalia vero non utique².

Upon this Matter consult at leisure the Authors in my Margin³.

It is infallibly true, that the Laws of Nature are the Laws of God, *with whom is no Variableness or Shadow of Turning.* And if it is impossible, that God should ever alter his Will, it is absurd to think, that the positive and arbitrary Dispositions of Mankind should be able to change it, or dispense with it. A Truth so plain and self-evident, that one would be apt to think, it did not want the Debates of Synods, the Learning of University-Doctors, or the Sanction of Kings to determine it⁴.

I might

⁷ Tulden.
Comment.
cap. III.
Gail. II.
Observ. 33.
⁸ Duck l. c.
II. 8.

⁹ Dr. Strahan's
Preface to
Domat.
Duck's
Treatise of
the Use, *etc.*
of the Civil
Law. l. 2 § 5, 6.
¹ D. I. l. 6. pr.
² J. I. 15. 3. fin.
³ Bolognet.
de Jur. et
Acquit. C. 16.
§ 16.
Grot. I. l. 10.
5. and
Muelen. ad
loc.
Selden. I. 8.
Pasend. II. 3. 5.
Muelen. ad
tit. D. de J.
et J. pag. 245.
seq.
Hoppius ad
Instit. L. I.
Tit. 2. fin.
Heinece de
Jure N. et. G.
l. 1.
⁴ See 25
H. VIII.
Cap. 22.

I might therefore easily be excused by the following Quotations; which indeed are not produced for the Strength of their Testimony, but for the peculiar and extraordinary Elegance, with which some of them are attended.

Οὐ γάρ τι μοι Ζεὺς ἦν ὁ κηρύξας τὰδε,
Οὐδ' ἡ ξύνοικ' τῶν κάτω θεῶν Δίκη,
Οἱ τὲς δ' ἐν ἀνθρώποισιν ὤρισαν νόμους.
Οὐδὲ σθένειν τοσῶτον ὁρμήν τὰ σα
Κυρύνμαθ', ὥς' ἀγραπία κασφαλῇ θεῶν
Νόμιμα δύνασθαι θνητὸν ὄνθ' ὑπερδραμεῖν.
Οὐ γάρ τι νῦν τε καὶ χθές, ἀλλ' αἰεὶ ποῖε
Ζῆ ταῦτα, καθεῖς οἶδεν ἐξ ὅτ' ἔφάνη.*

⁵ Sophocl.
Antigon.
† 456.

Hic Legi nec abrogari fas est, neque derogari ex hac aliquid licet, Neque tota abrogari potest. Nec vero aut per Senatum, aut per Populum solvi hac Lege possumus. Neque est quaerendus Explanator, aut Interpres ejus alius: nec erit alia Lex Romae, alia Athenis: alia nunc, alia posthac. Sed et omnes Gentes, et omni tempore una Lex et sempiterna et immutabilis continebit: unaque erit communis quasi Magister, et Imperator omnium Deus, ille Legis hujus Inventor, Disceptator, Lator: cui qui non parebit, ipse se fugiet, ac naturam hominis aspernabitur, atque hoc ipso luet maximas poenas, etiamsi cetera supplicia quae putantur effugerit.

⁶ Cic. de Rep.
apud Lactant.
VI. 8.

Τὸ μὲν φύσει ἀκίνητον καὶ πανταχῇ τὴν αὐτὴν ἔχει δύναμιν, ὡς περὶ τὸ πῦρ καὶ ἐνθάδε καὶ ἐν Πέρσας αἰεὶ.†

⁷ Aristot. V.
Ethic. 8.

Τὸ μὲν Ἐπιεικὲς αἰεὶ μένει, καὶ ὑδέποτε μεταβάλλει, ὥς δ' ὁ κοινὸς, κατὰ φύσιν γὰρ ἔστιν. οἱ δὲ γεγραμμένοι πολλαίκις.‡

⁸ Id. I.
Rhetor. 16.

For Natural Principles, according to the same Aristotle⁹: πανταχῇ τὴν αὐτὴν ἔχει δύναμιν, καὶ ἐ τῷ δοκεῖν ἢ μή.†

⁹ V. Ethic.
10.

* *Decreta quippe haec nec supremus Jupiter, Nec Fas Deorum Manium disclaverat; Quis alia jura debet humanum genus. Nec id valere credidi jussus tuos, Vt fura non conscripta, sed nutu Deum Concessa, sempiterna, mortalis satus Violare possis. Non enim nuper vigent, Sed aevo ab omni initia in occulto latent.*

† *Quod Natura est, immobile est, et ubique eandem habet vim, quemadmodum Ignis et hic et apud Persas urit.*

‡ *Aequum semper manet, et nunquam mutatur, et similiter Lex Communis, nam secundum Naturam est. Leges Scriptae autem saepe [mutantur].*

† *Semper et ubique eandem habent vim, non quia ita decretum sit vel non.*

Philo the Jew has expressed it properly and fully :

Νόμος αἰψευδής, ὁ ὁρθὸς λόγος, οὐχ ὑπὸ τῆς δεινῆς ἢ τῆς δεινῆς θνητῆς φθαρτῆς,
ἐν καρδίαις ἢ σήλαις ἀψυχῶν ἀψύχοις, ἀλλ' ὑπ' ἀθανάτου φύσεως
ἀφθαρτῆς ἐν ἀθανάτῳ διανοίᾳ τυπωθεὶς *.

¹ *Quod liber
sit quisquis
virt. jud.
T. I. pag.
452. Edit.
Ivang.
Arg. D. 8. 2.
2.*

For,

*Perpetuum est, quod causam habet naturalem*².

If the Law of Nature be Right Reason, it is impossible it should be altered, whilst Right Reason continues to be Right Reason. And it is as Impossible, that God should ever dispense with its Obligation.

The Mistakes which some have given in to, by ascribing the Idea of Impossibility to God: *quaedam esse ad quae potentia Dei se non extendat*, have been well laid open by a great Writer among the Moderns, who has done a great Credit to this Profession.

His Determination upon the Question before us will be more satisfactory, than any thing I can be able to produce :

As that which God wills, must of necessity be best and most perfect. He cannot be supposed to will what is less good or less perfect. Not that he cannot act otherwise, through any Infirmary or Impotence of his Nature, but because He cannot will otherwise, by reason of the utmost Perfection of his Will.

And this leads me to an Observation or two.

³ D. 1. 3. 31.

⁴ *Dion Cassius*
LIII. 18.

Reimar ad
loc.

Cujac. XV.
Observ. 30.

Muret.
XVIII. Var.
Lect. 11.

Nerii II.
Analect. 23.

Noodt. 141.
Observ. 4. et

Dissertat. de
Jure Summi
Imperii.

Campian. de
Magistrat.
pag. 24.

⁵ D. 1. 3. 31.

⁶ *Ad Cic. II.*
Philip. 13.

⁷ *Ad L. Juliam.*
et *Pap. Popp.*
III. 5.

1. When it is advanced by *Vlpian*³, that the Prince or Emperor is *Legibus solutus*, i. e. stands clear of the Obligation of Law, the Writers upon that Passage are considerably divided in their Judgments and Observations⁴.

Some imagine it was meant of that particular Law, the *Lex Julia Caducaria*, of which *Vlpian* was there discoursing, and from whose Dissertation these words⁴ are taken. Thus in several Acts of Parliament with us the Royal Family stands exempted from the Observation of them by Provision in the act itself. And indeed many Instances in Antiquity favour this Supposition; where the Emperor appears to be discharged from his Obligation, not *ratione Principis*, sed *actu legis*; non *vi imperii*, sed *beneficio Senatus*. Some of which are recounted by *Graevius*⁶ and *Heineccius*⁷.

Others think, that the Emperor was exempt from the Penalty only: And others again, that this Discharge consisted in that Right, which, as supreme Legislator, He sometimes exerted in repealing old Laws and proposing new ones for the public Convenience.

However the Matter stood; How, and by what Right, and in what Degree, he was dispensed with his Obedience to the Laws of his own

* *Est autem vera Lex, Recta Ratio, quae Lex non ab hoc aut illo, mortali mortalis, non in chartis aut columnis, exanimis exanima, sed corrumpi nescia ab immortali natura in mente immortali exarata.*

making;

*Vid. Noodt.
Opera ad 298.
p. 23.*

making; All, who have touched this Matter, agree, that He could not be absolved from those of his Nature or his Being. So that *Caracalla* reasoned but ill, when He thought He was at Liberty to marry with his Father's Wife, because He was Emperor :

Interest scire, quemadmodum novercam suam Juliam uxorem duxisse dicatur. Quae quum esset pulcherrima, et quasi per negligentiam se maxima corporis parte nudasset, dixissetque Antoninus, Vellem, si liceret, respondisse refertur, Si libet, licet. An nescis Te Imperatorem esse, et Leges dare, non accipere? Quo audito, furor inconditus ad effectum criminis roboratus est: nuptiasque eas celebravit, quas, si sciret se Leges dare, vere solus prohibere debuisset. Matrem enim, non alio dicenda erat nomine, duxit uxorem⁷.

⁷ Spartian. in Caracall. C. 9.

And accordingly, when *Claudius* married his Brother's Daughter,

*Genitamque Fratris Conjugem captus sibi
Toris nefandis flebili junxit face⁸,*

⁸ Senec. Octav. Act. I. v. 138.

and procured moreover those Marriages to be declared lawful by a *SCtum*, He found but one Roman (*Suetonius*⁹ says two) that could be⁹ in Claud. prevailed upon to follow his Example, and that One at the solicitation⁹ of the Empress¹.

¹ Tacit. XII. Annal. 7.

On the other hand, *Dionysius* the Elder, when his Mother requested a thing contrary, not indeed to Natural Law, but, what comes up to it, to the Course or Order of Nature, replied very adroitly :

*Τὲς μὲν τῆς Πόλεως βιάσασθαι νόμους δύνασθαι, τὲς δὲ τῆς Φύσεως μὴ δύνασθαι². **

² Plutarch. Apophthegm. et in Solone, pag. 196. Edit. B. yan.

And from hence it will follow,

2. That in all *Causae Dispensabiles*, it is Positive Law alone, that can be dispensed with, and not the Law of Nature. *Malum in se*, our Common Lawyers maintain, admits of no Dispensation. For Dispensation has that Effect, as to render an Act *legitimum quoad hunc*, which is *probitum quoad alios*.

3. It is held, that in Criminal Actions, what is called by the name of Distributive Justice may take place; that is, Persons, their Conditions or Circumstances may be taken into Consideration; Old Men are dealt more favourably with, than Young, Women than Men, and Free-Men than Slaves³. However it must be restrained to such Crimes only, which are against Positive Law: for in Cases against Natural Law, all People are punished alike. *E. g.*

³ D. 47. 21. 2. 49 16. 5. pr. 50. 17. 108.

* *Ego Civitatis Legibus vim facere possum, Naturae legibus nequeo.*

Quare

CIVIL LAW.

Quare Mulier tunc demum eam poenam, quam Mares, sustinebit, cum Incestum Jure Gentium prohibitum admisit: nam si sola Juris nostri Observatio interveniet, Mulier ab Incesti crimine erit excusata.*

* D. 48. 5.
38. 2.

4. These Rules of our Nature, as they cannot be defeated by Positive Institution, so neither do they want to be enforced by their Sanction or Authority.

Ejus rei, quae sua sponte scelerata ac nefaria est, ut, etiamsi Lex non esset, magnopere vitanda fuerit.*

* Cic. III.
Verrin. 42.

The Want of this Observation lately led the great Antiquary, *Muratori*, into a Mistake. Meeting with several such Inscriptions as this:

D. M.
AEMILIAE SECVNDAE
CN. AEMIL. PRIMITIVOS
ET
L. OCTAVIVS IVCVNDVS.
FECER. C. B. M.

i. e. *Conjugi Bene Merenti.*

He concluded, that Polygamy was lawful among the Romans, and, what is more, that kind of Polygamy, which no Nation upon Earth ever gave into, *ut una apud Duos nupta esset**. And this He is encouraged to maintain, *because there appeared no Law in that Country to restrain it†*.

* Gell. I. 23.
† See Maffei
Museum
Veronens.
Pag. CXLVIII.

I know of no Statute in this Country, which enjoins Filial Piety, or secures to us the Obedience of our Children. Would *Muratori* form an hasty Conclusion from thence to our Discredit and Disadvantage?

Supposing there were no express Prohibition in any Constitution in the World against marrying in the Ascending and Descending Line, would it therefore be laudable?

Quod si ideo permixtum putas, quia specialiter non est illud prohibitum, nec illud prohibitum sermone legis reperies, ne Pater filiam suam accipiat uxorem. Numquid ideo licet, quia non est prohibitum? Minime. Interdictum est enim Naturae jure: Interdictum est Lege, quae est in cordibus singulorum: Interdictum est inviolabili descriptione Pietatis, titulo necessitudinis‡.

‡ Ambros. ad
Patern. Epist.
lib. 6.

Vnde nec Volgo quaesitam filiam Pater Naturalis potest uxorem ducere: quoniam in contrahendis Matrimoniiis Naturale Jus et Pudor inspicendus est. Contra pudorem est autem, filiam uxorem suam ducere§.

§ D. 3. 2. 14.
2.

Therefore the *Jus Civile Merum* (as indeed the Distinction imports) is more properly *Civil Law*, and more expressly the Employment of the
Civil

Civil Legislator. He takes up what the Law of Nature had left indifferent, and there exerts a plenitude of Authority :

Νομικὸν, ὃ ἐξ ἀρχῆς μὲν ἔθεν διαφέρει ἕτως ἢ ἄλλως· ὅταν δὲ θῶνται, διαφέρει.*

¹ Aristot. V.
Ethic. 10.

Not that he is either forbidden or excused from dealing with the Law of Nature, as some Instances have shewn, and some hereafter may shew more fully, that He can deal with it successfully ; I would only observe, that in this particular his Legislative Capacity is considerably determined.

Having raised the Consideration of Natural Law as high as I well could, it is time now to return, and to see, what I set off with, how it can possibly abate by the Influence of Civil Sanction, as it is given out, and how that Abatement could be understood.

To this We say in general: It is infallibly true, that the Laws of Nature are such, that God himself cannot dispense with the Obligation of them. He cannot so change the Circumstances of things, as that Murder or Adultery, &c. should ever become our Duty.

— ὃ γὰρ παλινάγρετον, εἰδ' ἀπαληλόν,
οὐδ' ἀτελεύτατον γ' ὅτι κεν κεφαλῇ κατανεύσῃ.

But I observe

I.

That the Laws of Nature, properly speaking, are immutable only in the Abstract or in Principle ; in Theory, not in Application. For very often the Object, the Season, Situation, and other Circumstances, may vary their Exercise and Obligation.

For Instance: *Neminem laedere* is always a reasonable and natural Duty in itself, universally true, the Voice of Nature, and founded upon the fairest Principles. But I can suppose myself in such a Situation, where the Voice of Nature would direct the quite contrary : that is, if I am unjustly attacked ; for there it would prescribe *Self-Defence*, which possibly may not be procured *sine laesione alterius* ². Here the Rule holds good ² D. 1. 1. 3. in *Thesi*, but not in *Hypothesi*. The Subject-Matter becoming differently circumstanced, there is occasion for another Rule of Nature to come into the Consideration. This is an *Exception*, which confirms the general Precept, not a Contradiction, which defeats it. And we therefore conclude, that the everlasting Principle *de Neminem laedendo* still maintains its absolute Verity, but in this particular case it must be interpreted or limited, *quoad hoc*, by a more important Law of the same Nature. Whence comes a Rule of Law,

Quotiescunque duo Praecepta Juris concurrunt, et utrumque servari non potest, toties standum fortiori.

* Legitimum, quod ab initio hoc an illo modo fiat, nihil refert: cum constitutum fuerit vero, tunc demum refert.

Thus

Thus also the Laws of Nature are so many general and extensive Sanctions, like Materials in the Hand of a great Master, which the Civil Law-giver, by Addition of special or particular Circumstances, such as *Actio, Solennitas, Tempus, Quantitas, &c.* may seem, to common Apprehension, to alter, whereas He rather confirms or interprets them, gives them their Edge, or shapes the Moulding. And this is what *Vlpian*³ means by *addimus*. What is meant by *destrabimus Juri Communi* will best be explained by follows :

II.

The Laws of Nature are of two Sorts.

Preceptive or Permissive,

That is, either *Duties enjoined, or Rights allowed us.*

Whatever is said to belong to, or be of, the Law of Nature, implies an express or immediate *Command*, or else some *Custom* and Institution of Life⁴.

These last are the *Jura Naturae improprie dicta* : such as Nature marked out for us, and our possible Conveniency, but left us at our Liberty, if We would make use of them or not. Such is the natural *Liberty* that every Man is born with, and that *Equality* of Condition which follows our Nature also. But these are *Rights*, not *Rules*, which I can part with upon proper Occasions, and upon the Prospect of mending my Condition in other respects.

Quae permittit Natura, says a good Writer upon this Subject, *ea quia in medio relicta, proprie non sunt Juris Naturae, licet per abusionem esse dicantur : eo, quod ei non repugnant, et ab initio sic obtinere, donec magis expedirent contraria.*

Thus *Servitude* need not be instituted, but for Conveniency ; and after it is once instituted, may be retained or abrogated at pleasure, for Conveniency also.

The *Hypothetical* Law of Nature seemingly partakes so much of the *Complexion* of Positive or Instituted Law, that to common Apprehension it admits of the same *Variety* with That : shifts the Scene as easily, as that does,

Et modo me Thebis, modo ponit Athenis.

But indeed here is no Alteration of *Jus*, though the Roman Lawyers, whose Words I am considering in this Question, apprehend it so. The *State*, the *Scene* of Action is principally affected, and not the *Law* or *Rights* which attend it. For, to pursue the Metaphor, when the Poet transports me from *Thebes* to *Athens*, I forget what is doing at *Thebes*, because I am not concerned with it. Their Rites, Religion, Language and Ceremonies affect me no longer. And yet by this Disinterestedness of mine, I deny

not their Existence to those who have occasion to make use of them, or may still be concerned about them.

If a Prince should empower by Charter a College or Fraternity to make Bye-Laws, not inconsistent with the Laws of the Country, and afterwards dissolve that Corporation, He cannot properly be said to abrogate the Laws of that Corporation also. They still live couched under the general Theory of the Laws of that Country, but abate in their particular Influence, because they are defeated of their particular Application.

And this is perhaps what *Aristotle* means, where he says,

“ Natural Law with the Gods is immoveable and immutable : but
“ with Man some kind of natural Law is mutable, but not all⁵.”

Thus having cleared this Question, I proceed to prosecute my Inquiries about *Civil Law*.

There are other Things called by that name which we do not exactly mean here.

I. Civil Law, with *Aristotle*, *Δίκαιον Πολιτικόν* is taken for Law in its utmost Extent, *pro Universo Jure Civitatis*, and comprehends the Law of Nature and of Nations, as well as *Positive Law*. For he divides his Civil Law into *Φυσικόν* and *Νομικόν*⁶.*

II. *Jus Civile* sometimes stands for the *Common Law* of the Romans, in Contradistinction to their *Jus Praetorium*, or *Law of Equity*⁷.

*Ab Intestato quoque Hereditas defertur aut per Jus Civile, aut per Praetoris beneficium*⁸.

And consequently *Actions* and *Obligations* are either *Legitimae*, i. e. *Civiles* ; or else *Praetoriae*, according as they appertain to the one Dispensation or the other⁹.

III. Sometimes one Branch of the Civil Law is called by the name of the whole. The *Genus* is put for the *Species*.

*His Legibus latis [XII. Tabb.], coepit, ut naturaliter evenire solet, ut Interpretatio desideraret prudentium auctoritate necessariam esse disputationem Fori. Haec Disputatio et hoc Jus, quod sine scripto venit, compositum a Prudentibus propria parte aliqua non appellatur, ut ceterae partes Juris suis nominibus designantur, datis propriis nominibus ceteris partibus : sed communi nomine appellatur Jus Civile*¹.

*Ita in Civitate nostra, aut Jure, id est Lege, constituitur : aut est proprium Jus Civile, quod sine scripto in sola prudentium interpretatione consistit : aut sunt Legis Actiones*².

* Naturale ——— Legitimum.

⁵ V. Ethic.
10. Add.

⁶ J. 1. 2. 11.

⁷ D. 4. 5. 8.

⁸ 7. 5. 2. 1.

⁹ 50. 17. 8.

C. 8. 53. 2.

⁶ V. Ethic. 10.

⁷ D. 1. 1. 7.

⁸ Praetor
XVI. 5.

⁹ J. 4. 6. 3.

3. 14. 1.

¹ D. 1. 2. 2. 5.

² § 12. eod.

⁴ III Offic. 61.

And this appears to be that *Jus Civile*, which *Tully* mentions ⁴, in opposition to the Laws of the XII. Tables.

It is a very common Practice in the Law-Books, and indeed in all Writers whatsoever, to use the same word both for *Genus* and one of the *Species*.

LEX, for instance is a *general* Term, including every Law enacted by a proper Authority : But moreover

Lex in a more specific, or a more restrained and emphatical Acceptation, is that particular Species of it, which was enacted by the whole Roman People, at the *Comitia Centuriata*, and proposed by the superior Magistrate only : and so stands distinguished from the *Plebiscitum*, the *SCtum*, the *Constitutio Principis*, etc.

Thus ADOPTIO is also a general Term, consisting of two Species, viz. *Arrogatio*, and, what wants a specific name, *Adoptio proprie dicta*.

Quod Adoptionis nomen est quidem Generale: in duas autem Species dividitur; quarum altera Adoptio similiter dicitur, altera Arrogatio ⁵.

D. 1. 7. 1. 1.

And upon this principle VIRTUS with the Romans came to stand for Courage.

Ὅλως μὲν ἔν ἐν τοῖς τότε χρόνοις ἡ Ρώμη μάλιστα τῆς ἀρετῆς τὸ περὶ τὰς πολεμικὰς καὶ στρατιωτικὰς ἐκύδανε πράξεις, καὶ ἐμαρτυρεῖτο τὴν ἀρετὴν τῶν αὐτῶν ἐν τῷ τῆς ἀνδρείας ὀνόματι προσαγορευέσθαι, ἢ τῷ τῆς γένους ὄνομα κοινὸν ὑπάρχον, ὃ τὴν ἀνδρείαν ἰδίᾳ καλεῖσιν ⁶.*

⁵ Plutarch.
Coriolan. init.

⁷ D. 44. 7. 28.

⁸ Muelen. ad
Grot. I. 1. 2. 3.
Voss. de Con-
struct. c. 42.

⁹ D. 48. 4. 11.

The same may be observed of *Actio* (for a *Real* Action has got the private name of *Petitio*, a *Personal* one is left unprovided for) *Cognatio*, *Jurisdicctio*, and many other words in the Roman Law ⁸. So *Duplex Crimen est Majestatis* ⁹.

Perduellionis. Majestatis.

In the same manner we find, that *Africa* (or that great Division of the World, which goes by that name) was divided into six Provinces; one of which also was called by the general name of *Africa* ¹:

¹ Pranciroll.
Notit. Occid.
c. 64.

² Eunapius in
Vita Maximi
Sophistae.

³ Varro de
L. L. 1. 4.

⁴ Constantin.
Porphyrog.
them. 3.

Λιβύης, ἣν Αφρικὴν καλεῖσι Ῥωμαῖοι κατὰ τὸ πάτριον τῆς γλώττης ² †.

Much the same We find of *Asia* :

Nam et Asia, quae non Europa, in qua est Syria: et Asia dicitur prioris Asiae pars ³.

Τὸ δὲ νῦν καλέμενον Θρακησίῳ θέμα πάλαι μὲν κατ' ἀρχαῖς ΑΣΙΑ ΜΙΚΡΑ ὠνομάζετο, καὶ ὁ ταύτης κρατῶν ἀνθύπατος Ἀσιαρχὴς ἐλέγετο ⁴. †

* Omnino habebat illis quidem tempestatibus Roma prae ceteris virtutibus artes bellicas et militares in honore. Quod confirmatur ex eo, quod virtutem illi ab uno fortitudinis nomine deducunt: et quum eo peculiari vocabulo Fortitudinem nuncupent, communis sit tamen Generis appellatio.

† Libyae, quam Africam Romani vocant populari modo loquendi.

‡ Quod vero nunc Thracensium Thema appellatur, olim quidem et ab initio Asia Minor dicebatur, et qui huic praeerat Praefectus Asiae [Aliarcha] dicebatur.

And

And here it may not be improper to take notice, that *Asia* is used by Writers in *three* different Senses, 1. For that large Tract of Country, or fourth Part of the Habitable World, that lies Eastward. 2. For that Division of it which lay more Westerly, and with which the Europeans, by their Wars and Commerce, were more intimately acquainted. This is called by some *Asia Minor*, and answers to that Division which obtained among the Greeks, who separated Asia into the Upper and Lower, of which they made the River *Halys* the common Boundary⁵. 3. The Roman Province, that went by the same name of *Asia* also, was still a Subdivision of this Lesser Asia: as we find in many Roman Writers, particularly in the *Verrinae* of *Cicero*, where we read of *Asia*, *Cilicia*, *Pamphylia*: all which are so many Divisions of Asia Minor.

This is the Asia to be understood in the *Acts of the Apostles*⁶. In the same Writer also⁷ We have mention of an Officer called *Ἀσιάρχης*. The Nature of whose Office, whether Civil or Religious, *etc.* has been the Subject of much Dispute.

I find him in *Gruter*⁸:

⁸ DXXII. 1.

Θ. Κ.
Α. ΑΝΤΩ
ΝΙΩ ΤΑΚΙΝ
ΘΩ ΛΑΟΔΙΚΕΙ
ΤΗC ΑCΙΑC CΤΡΑ
ΤΗΓΩ ΑCΙΑΡ
ΧΗ ΕΤΤΥΧΗC
ΑΠΕΛΕΥΘΕΡΟC
ΜΝΕΙΑC ΧΑΡΙΝ.

I have no Doubt but that the Office was of a Religious Nature, which will suit well with the Passage of St. *Luke*, and is what *Papinian* refers to in the following Law:

*In Asia Sacerdotium Provinciae suscipere non coguntur numero liberorum quinque subnixi, quod Optimus Maximusque Princeps noster Severus Augustus decrevit, ac postea in ceteris provinciis servandum esse constituit*⁹.

⁹ D. 50. 5. 3.

All those Eastern Provinces had them¹, and the *Syriarcha* resided at Antioch, the Capital of that Province, as the *Asiarcha* did here at Ephesus. Having got thus far on my Way in Positive Law, before I come to consider the several Parts or Branches of which the Roman Law is composed, let me draw together some Observations upon *Lex*, or a Positive Law, in general.

LEX, in the large Idea of it, includes every Law enacted by a proper Authority, and is applicable to the Law of Nature, as well as the Civil Law; and to Customary, or Unwritten Law, with the same Propriety, as to Written. It means a Rule, a Precept, or Injunction: a

⁹ pag. 42. Number or System of which, as We have seen above⁹, gives us the

¹ D. 1. 3. 1. Idea of *ivs.* It is thus used frequently in the Law-Books¹.

¹ 3. 2. 2. In a Civil Sense it is used to signify all kind of Positive Law, as it
^{C. 5. 20. 1.} stands opposed to Natural. Thus must be understood that Law², as We
² D. 1. 3. 31. have lately seen upon another occasion: *Princeps Legibus solutus est: Augusta autem licet Legibus soluta non est, Principes tamen eadem illi privilegia tribuunt, quae ipsi habent.*

Digna vox est Majestate Regnantis, Legibus alligatum se Principem profiteri: Adeo de Auctoritate Juris nostra pendet Auctoritas. Et revera majus Imperio est, submittere Legibus Principatum³.

³ C. 1. 14 4.

Hae autem immunes a judiciaria severitate et stupri et adulterii praesentur, quas vitae vilitas dignas Legum observatione non credidit⁴.

⁴ C. 9. 9. 29.

⁵ apud Gell.
X. 20.

So *Ateius Capito*⁵:

Lex est generale Jussum Populi aut Plebis rogante Magistratu.

In this Consideration, *Plebiscitum est Lex, SCtum est Lex*, etc.

3. It is taken more rigidly, as We have just now observed, for that particular Branch of Law which was proposed by a proper Officer, and enacted by the whole Roman People collectively, and so it stands opposed to all the other Parts of the Roman Law.

In which Sense *Plebiscitum* is *not Lex*: Neither is *SCtum*, etc.

4. It is sometimes taken for Statute Law, as opposed to Custom:

Inveterata Consuetudo pro Lege non immerito custoditur—Nam cum ipsae Leges nulla alia ex causa nos teneant, quam quod judicio Populi receptae sunt, merito et ea quae sine ullo scripto Populus probavit, tenebunt omnes. Nam quid interest, suffragio Populus voluntatem suam declaret, an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut Leges non solum suffragio Legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur⁶.

⁶ D. 1. 3. 32.

Si de Interpretatione Legis quaeratur, in primis inspiciendum est, quo Jure Civitas retro in ejusmodi casibus usa fuisset. Optima enim est Legum interpres Consuetudo⁷.

⁷ l. 37. eod.

5. A particular Law, such as *Papia Poppaea, Cornelia, Julia*, etc. is often in the Digest called *Lex*, without informing us which Law is meant. This is one Instance of *Tribonianism*.

Sin autem pecunias a Debitore meo exegisti, in hoc, quod modum Legis excedit, habeo contra te Conditionem⁸.

⁸ D. 39 5. 21.

The Law there meant is the *Lex Cincia*. And had We *Celsus* complete, whose words these are, We should possibly find it so in express terms, in some Part of the preceding Discourse.

6. Add to this, it is often applied to that System of Law, that *Jus*, which descended from the XII. Tables, and formed the Basis of all the Roman Law whatsoever.

Lege

*Lege obvenire hereditatem non improprie quis dixerit et eam quae ex Testamento defertur: quia Lege XII. Tabb. Testamentariae hereditates confirmantur*⁹.

And thus, *Lex*, *Legitimus*, etc. is often restrained to the special Signification of that System¹.

7. *Lex* is often understood of the Terms of a private Covenant: *The Condition of the Obligation*.

*Hac Lege tibi meam adstringo fidem*².

*Ea Lege atque Omine, ut, si Te inde exemerim, Ego pro te molam*³.

8. *Lex*, like *Carmen*, is often taken for a *Form of Words*, prescribed to be used upon particular Occasions. As the *Lex Dedicationis*, *Lex Virginis Vestalis capiundae*: The Ritual or Formulary in the Execution of those several Functions. *Carmen Arrogationis*⁴, *Compitalium concipien-
dorum*⁵, *Jurisjurandi Militaris*⁶. Which I shall have a fairer Opportunity of speaking to a little below.

9. *Lex* stands for a Section in the Digests. As when We say *Titulo primo, Lege tertia, Paragrapho ultimo*.

The DEFINITIONS or Descriptions of a
Positive Law are, as follows:

Νόμος, λόγος ὁρισμένον καθ' ὁμολογίαν κοινὴν πόλεως, μηνύων πῶς δεῖ
πράττειν ἕκαστα⁷.

*Lex est generale Jussum Populi aut Plebis rogante Magistratu*⁸: more particularly with a View to the Roman Method of enacting it.

*Lex Commune Praeceptum summi Imperantis, obligans Cives ut ad ejus
normam actiones suas componant*.

*Jussio summae Majestatis singulos Cives in Rep. obligans*⁹.

Of those produced by *Tribonian*¹: a Positive Law is best described by *Papinian*:

*Lex est commune Praeceptum: Virorum prudentium Consultum: De-
lictorum, quae sponte vel ignorantia contrahuntur, coercitio: com-
munis Reip. Sponsio*.

*Demosthenes*², as cited here by *Marcian*, rather also describes, than de-
fines:

Τῆτό ἐστι νόμος, ὃ πάντας ἀνθρώπους προσήκει πείθεσθαι, ἀλλὰ πολλὰ, ἔ-
μάλιστα, ὅτι πᾶς ἐστὶ νόμος εὐρημα μὴ καὶ δῶρον θεῶν, δόγμα δὲ ἀνθρώπων
φρονίμων, ἐπανόρθωμα δὲ τῶν ἐκείνων καὶ ἀκεσίων ἀμαρτημάτων, πόλεως
δὲ συνθήκη κοινὴ, καθ' ἣν ἅπασι προσήκει ζῆν τοῖς ἐν τῇ πόλει. †

* *Lex, Oratio definita ex communi consensu Civitatis, indicans quemadmodum unamquamque rem exsequi oporteat.*

† *Lex est, cui omnes obtemperare convenit, tum ob alia multa, tum vel maxime eo quod omnis Lex inventum ac munus Dei est, decretum vero prudentum hominum, coercitio eorum quae sponte vel involuntarie delinquantur, communis sponsio Civitatis, ad cujus praescriptum omnes qui in ea Rep. sunt, vitam instituere debent.*

That

⁹ D. 50. 16.
¹³⁰ J. 1. 17.
unic. D. 2. 14.
7. 14.
⁴¹ 3. 3.
⁴⁸ 5. penult.
Cicer. Topic.
8. Festus v.
PERCUNCTA-
TVM.

¹ See pag. 12.
of this Trea-
tise.

² Ter. Eunuch.
I. 2. 22.

³ Id. Andr.

I. 2. 29.

⁴ Gell. V. 19.

⁵ Id. X. 24.

⁶ Id. XVI. 4.

⁷ Aristot.
Rhet. ad A-
lex. Cap. I.
⁸ See Gell. X.
20.

⁹ Hoppius.

¹ D. 1. 3. 1. 2.

² I. contr. Ari-
stot t. p. 470.
Edit. Cant.

⁹ D. 1. 3. 2.

That of *Chrysippus*⁹ is applicable to all Law in general, whether Natural or Positive: but it may be worth while to produce it. It is the Spring from which many have drawn.

Νόμος, πάντων ἐς βασιλεὺς θεῶν τε καὶ ἀνθρωπίνων πραγμάτων. δὲ δὲ αὐτὸν προσάτην τε εἶναι τῶν καλῶν ἔ τῶν αἰσχυρῶν, καὶ ἀρχοντα καὶ ἡγούμενον, καὶ κατὰ τῆτο κανόνα τε εἶναι δικαίων καὶ ἀδίκων καὶ τῶν φύσει πολιτικῶν ζώων, προστατικὸν μὲν ὧν ποιητέων, ἀπαγορευτικὸν δὲ τῶν ἐ ποιητέων.*

So the vulgar Editions have it: The *Florentine* or *Pisan* Code, infallibly right, ΠΡΟΣΤΑΚΤΙΚΟΝ.

¹ Lect. Lyfiac.
Cap. ult.

Something of this I observed in my Edition of *Lyfiac*¹; Προστατικὸν is from Προσάτης, *Praeses*, *Dux*, a Sense that may be admitted in the Beginning of this Quotation. Προστατικὸν only is *Imperative*, and the Sense required in this place, to confront immediately to ἀπαγορευτικόν.

ΠΡΟΣΤΑΚΤΙΚΟΝ μὲν ὧν ΠΟΙΗΤΕΟΝ, ἀπαγορευτικὸν δὲ ὧν ἐ ΠΟΙΗΤΕΟΝ.

² Cap. de Legg.
et Consuet.
³ de Vita Mosis
l. 2. init.

So the MS. It might have been better perhaps, ΤΩΝ ποιητέων, and ΤΩΝ ἐ ποιητέων. So *Stobaeus* reads².

Thus *Philo* writes³:

ΠΡΟΣΤΑΞΙΣ δὲ τῶν πρακτέων, καὶ ἀπαγόρευσις τῶν ἐ πρακτέων, ἴδιον νόμος. †

⁴ I. de Legg. 6.

And, according to *Cicero*⁴,

Legis Vis est, ut recte facere jubeat, vetet delinquere.

And again:

⁵ Ibid.

*Lex quae scripto sancit quod vult aut jubendo aut vetando*⁵.

⁶ D. 1. 3. 7.

And *Modestinus*⁶:

Legis Virtus est Imperare, Vetare——

Let me subjoin an Observation or two upon some Properties of a Law or Civil Sanction.

Which Considerations my Reader will find to relate either to the *Intrinsic* Idea of It, or else to regard those Circumstances, which may attend it *from without*.

* *Lex est omnium divinarum et humanarum rerum regina. oportet autem eam esse praesidem et bonis et malis, et principem et ducem esse: et secundum hoc, regulam esse justorum et injustorum, et eorum quae natura civilia sunt, animantium, praeceptricem quidem faciendorum, prohibetricem autem non faciendorum.*

† *Justio rerum faciendorum, et Prohibitio non faciendarum, id proprium est Legis.*

I.

The Nature of a Positive Law, or a Civil Constitution, (though herein I differ from two very considerable Writers⁵, among others) I hold to partake more of the Nature of a *Covenant*, than is generally apprehended.

Aristotle frequently⁶ defines Instituted Law by Ομολογία* and Συνθήκη†.

Λόγος ὠρισμένος καθ' ΟΜΟΛΟΓΙΑΝ κοινὴν πόλεως, μηνύων πῶς δεῖ
πράττειν ἕκαστα⁷. †

ΟΜΟΛΟΓΗΜΑ πόλεως κοινόν, διὰ γραμμάτων προσάττον πῶς χρὴ
πράττειν ἕκαστα⁸. ||

Εἰσι δὲ νόμοι, συλλήβδην μὲν εἰπῶν, ΟΜΟΛΟΓΗΜΑΤΑ κοινὰ πόλεως, α
διὰ γραμμάτων ὀρίζει πῶς, etc.⁹ **

Demosthenes, as we have immediately seen, calls it Πόλεως συνθήκη κοινή ††; and *Papinian*², *Communis Reip. Sponsio*. And this is the common Language of the Ancients, as appears from what *Pufendorf*³ and *Barbeyrac* have produced upon that head. It is so much their Language, that *Civil Law* frequently assumes this very Character, and lays hold of this Description, in order to be distinguished from *Natural*.

So *Romulus* is said παντὸς τῆ ΚΑΤΑ ΦΥΣΙΝ ἔ ΚΑΤΑ ΣΤΝΘΗΚΑΣ δικαίε προνοῶν⁴. ††

It is odd, that the Ancients should agree to give it this *distinguishing* and characteristic Feature, and yet that Feature should not belong to it at all.

The Civilians, though they maintain this Truth, yet account for it but weakly. They hold, that *there is no Obligation without Contract*. If that were to be admitted, it would do the Work both readily and effectually. But shall We say, that neither the Original Laws of Nature, nor the Positive Laws of God lay us under any Obligation? For who was Witness to the Contract in either Consideration? Or what is there that looks like a Bond for the Performance of Covenants?

Natural Law being the Will of God; God Almighty by his Power having an absolute Right over his Creation; and by his infinite Wisdom and Goodness having contrived the best System of Duty for Us, that could be imagined; his Laws are binding, whether We will or no. Our

* *Consensio*. † *Patium*.

† *Lex Oratio quaedam est, definita ex communi Consensu Civitatis, jubens quo pacto unumquodque agendum sit.*

|| *Communis Civitatis Consensus, qui scriptis praeceperit quomodo unumquodque agendum sit.*

** *Leges sunt, ut summatim dixerim, Civitatis publici Consensus, qui scriptis terminantur atque imperant quomodo, etc.*

†† *Communis Sponsio Civitatis.*

‡‡ *Omnis Juris Naturalis, et ex communi hominum Consensu pactoque scripti curam gerere.*

Consent is not asked or expected. On the other hand, the Laws, which a Man submits to in his Civil Capacity, being all of a positive and arbitrary Nature, and therefore not binding from any internal Necessity (as the Laws of Nature may in some Sense be said to be) must derive their Authority from mutual Consent. If I have no irresistible Necessity from any over-ruling Hand to quit my natural Liberty, where things indifferent remain in their State of Indifference; what is left but my own Choice, Consent, or Concurrence, to allow those things to become *not indifferent*, which were indifferent before?

But it is said, that Law cannot partake of the Nature of a Contract, because in the latter, if one single Man with-holds his Consent, there is no Stipulation: whereas in the former, neither the Dissent of One, nor even of Many, shall defeat the Obligation. I think the Objection is not fairly put. Contracts or Partnerships more exactly correspond to Governments or Societies, and the Rules of this Partnership, to the Laws of this Government. If therefore upon my Entrance into this Partnership, I covenant to be concluded in my Negotiations, either by the Direction of One Man, in whom I may be considered to have reposed a great Confidence; or by the Sentiments and Counsel of the most substantial and *most Considerable*; or lastly by a Majority of the *Whole*, is not the Comparison more faithful, and the Instance more apposite? Are not the Circumstances more exact, and the Images better represented? And then what is become of the Objection?

But Law is a Precept, it is urged again; and so We have all along allowed it: And what Connection can there be between *Precept* and *Contract*? What so irreconcilable, as the Direction of a *Superior*, and the mutual Combination of *Equals*? I answer, that Legislation may fairly consist of both. I can suppose a Body of People to stipulate in general, that certain indifferent things, for common Utility sake, shall lose their Indifference: And the same common Consent shall either throw upon some Superior a Power of marking out, which of those indifferent things—how far in Point of Extent—and how long in regard to Duration—shall lose their Indifference; or else shall keep this Power, as it were, in their own Hands, and chuse to be consulted upon every particular Emergency, and be directed by the Superiority of the general Voice, or the greater part of it. Now this Superiority, either ways thus constituted, gives this united *Consent* the formal *Ratio* of a Rule or *Precept*, calls forth the Obligation, and supports and invigorates the Execution. The Mistakes upon this head have arose from hence: *viz.* That this mutual Concurrence in some Species of Legislation, and in some Schemes of constituting this Superiority, is but faintly apprehended, as where the People, by a kind of *Compromissum*, make over their Right to One, or to a Few; whereas the Compact gathered from the Whole, in the Declaration of their Majority, is more glaring and conspicuous. And accordingly, those great

great Names I mentioned, could admit the Resemblance or appearance of a Covenant in one Case, but not in the other. What could incline them to allow this Difference, I cannot apprehend. As if the eternal, intrinsic, universal, abstracted and fundamental Principle of Instituted, Positive Law could vary according to the accidental and extrinsic Modes of producing it into Act: the Shape, or any other indifferent Circumstance of political Government.

There is no *Obligatio ex Contractu*, say they again, in written Laws, but their Obligation is derived from the Directions of Natural Law, and the everlasting Rules of Right Reason. For Natural Reason points out the Necessity of drawing up a set of Rules to support Society by: the same Reason which recommends a State of Society to us, recommends, or rather enjoins, the Duty of supporting it by these Means, or Rules, which are thought so proper for that Purpose. But this is greatly beside the Mark. *Standum esse Pactis Conventis* is one of those Natural Precepts; and it is that by which We regulate our Conduct in supporting our ordinary Stipulations and engagements. But this Consideration takes not off from the original Idea of forming this Stipulation. The Covenant itself is no less a Covenant. It is built upon one Principle, and maintained by another. Consent must give it Existence, though something else may lend it Obligation. And as all Natural Law is the Law of God, it is upon this Account, That even Civil and Positive Institutions may be said to be *εὐρημα ἔξ ὧρον θεῶν**; That the prophane Lawgivers affected always an Intimacy with their respective Divinities, of which several Instances are produced by *Valerius Maximus*⁶, *Gothofred*⁷, *Connanus*⁸, and other Writers in great Plenty; and lastly, That the Romans, down as far as the Age of *Juvenal*, could point out the Place,

Hic ubi nocturnae Numa constituebat amicae,

as that Poet very ludicrously expresses it⁹.

Upon the Whole, I apprehend the Nature of a Law to resemble a Covenant so expressly, that nothing can be more so.

Ο Νόμος, says a great Writer upon a great Subject, *Συνθήκη, ἔ, καθάπερ ἔφη Λυκόφρων ὁ σοφιστής, ἐγγυητής ἀλλήλοις τῶν δικαίων, ἀλλ' ἔχ' οἷον ποιεῖν ἀγαθὸς ἔ δικαιός τὸς πολίτας*¹.

Which words being very important to my Purpose, I chuse to render thus paraphrastically:

* *Inventum ac munus Dei.*

⁶ Demosth. I. c. Aristogit. pag. 470. Edit. Cant.

⁶ I. 2.

⁷ Not. ad.

D. 1. 3. 2.

⁸ Comment.

Jur. Civ. l. 8.

⁹ III. Sat. 12.

¹ Arist. III. Polit. 6.

Positive Law is in all respects a Contract or Covenant. The Contracting Parties are the Public and the Individuals; the Governors and the Governed. On the side of the public Administration, it is stipulated by these Laws, that a general Security shall be maintained, and every person, who is a Party in the Contract, shall have his just Rights protected, shall not be molested by any Act of Violence in his Person or his Fortunes: or, if He is molested, upon a proper Complaint He shall find that these Laws will revenge his Quarrel; and that they can punish, as well as prescribe². This, says the Public, I can engage for, and no more. To make Men radically Good, is a thing much to be wished for, but it is not my Business, nor is it within the Sphere of my Activity.

² D. 1. 3. 7.

Here is a *Sponsio Civitatis*, a direct *Facio ut facias*: and We must now inquire what is the Contract on the other Side. Doubtless every Member contracts for his own Behaviour: and, what still favours more of a Stipulation, here is a Security for the Performance of his Covenant, which, in some respects may be called a collateral one; namely a Penalty, or extrinsic Sanction, an Evil or Inconvenience, which will infallibly attend the Breach of this Covenant, and yet is not the natural Product and Consequence of the Action itself; For that being a natural Inconvenience, would operate of itself without a Law.

³ Lock upon Human Understanding. II. 27. 6.

Both Greeks and Romans were so possessed of this Notion, that all Civil Penalties with them were looked upon as so many Debts, or Payments of Debts, arising from the Breach of Contract. Thus We must understand the words *Ζημία, Αποτίναν*, etc. in one Language, and *Poenas pendere, solvere*, etc. in the other.

Lastly, if it is true, that, *Quodcunque colligatur, eodem modo dissolvitur*, the Reverse of that Axiom may be true also. And if the general Consent, or a long approved Custom, can lay a Law aside, it is fair reasoning to conclude, that it was that general Consent, or public Approbation, that set it up.

Cum ipsae Leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes. Nam quid interest, suffragio populus voluntatem suam declaret, an rebus ipsis et factis? Quare rectissime etiam illum receptum est, ut Leges non solum suffragio Legislatoris, sed etiam tacito Consensu omnium per desuetudinem abrogentur⁴.

⁴D. 1. 3. 2. 1.

And indeed whether a Law, among the Romans, lost its Force by silent Practice, or public Authority, it comes up equally to my Point. For here also the Consent of the Public was asked, and the word *Abrogare* speaks it. Or rather, so did their whole Process, where Stipulation was visible in every Branch of it.

The

The Person who proposed a Law, was said *Populum rogare*, to ask the People's Consent.

The Form of proposing it speaks the same Language—*VEL ITIS IVBEATIS, QVIRITES? IS IT YOUR WILL AND PLEASURE?*

And lastly the Form of the People's Assent, which was expressed by these two Letters upon a Ticket, *V. R.* that is, *Vti Rogas*.

Lex aut Rogatur, id est, fertur: aut Abrogatur, id est, prior Lex tollitur: aut Derogatur, id est, Pars primae Legis tollitur: aut Subrogatur, id est, adjicitur aliquid primae Legi: aut Obrogatur, id est, mutatur aliquid ex prima Lege.

⁵ Vlpian. I. Tit. 3.

Huic Legi nec Subrogari [M. S. Praerogari: Pitheous, Obrogari. Legitur etiam Promulgari] fas est, neque Derogari ex hac aliquid licet, neque tota Abrogari potest.

⁶ Cic. apud Lactant. VI. 8.

Quod per Legem Claudiam promulgare, abrogare, derogare, obrogare, sine fraude sua non liceat.

⁷ Cic. III. Attic. 23.

Festus has *exrogare* likewise. But it differs not with him from *Derogare*.

EXROGARE est, ex Lege vetere aliquid eximere per novam Legem.

DEROGARE proprie est, cum quid ex Lege vetere, quo minus fiat, sancitur Lege nova. Derogare ergo Detrahere est.

II.

It is a Property of Instituted Law, to be grounded upon the Commission of some Fact, which has already happened, and not to guard against a possible Contingency.

Solo cum interrogaretur, cur nullum supplicium constituisset in eum, qui parentem necasset, respondit, Se id neminem facturum putasse. Sapienter fecisse dicitur, cum de eo nihil sanxerit, quod antea commissum non erat, ne, non tam prohibere quam admonere videretur.

⁸ Cic. pro S. Roscio. § 25.

Ufu probatum est, Leges egregias, exempla honesta, apud bonos ex delictis aliorum gigni. Sic Oratorum Licentia Cinciam Rogationem, Candidatorum Ambitus Julias Leges, Magistratum Avaritia Calpurnia scita pepererunt. Nam Culpa, quam Poena, tempore prior: Emendare, quam peccare, posterius est.

⁹ Tacit. XV. Annal. 20.

*Εκ γὰρ τῆ πρώτης θαι τινὰ ὧν ἔ προσῆκεν, ἐκ τότε τὰς νόμους ἔθεντο οἱ παλαιοί.**

¹ Aeschin. c. Timarch. pag. 15. Edit. Demosth. Cant. T. II.

There is a remarkable Story in *Plutarch's* Life of *Lycurgus*, which may deserve a Place upon this Occasion.

* Nam ea de causa Leges a Majoribus sancitae sunt, quod quaedam contra quam deceat, committantur.

Λόγῳ ἀπομνημονεύεται Γεράδῳ τινὸς Σπαρτιάτῃ τῶν σφόδρα παλαιῶν, ὃς ἐρωτηθεὶς ὑπὸ ξένου, τί πάσχεισιν οἱ μοιχοὶ παρ' αὐτοῖς, εἶπεν, ὦ ξένε, εἰδὲς γίνεται μοιχὸς παρ' ἡμῖν. ἐκεῖνε δὲ ὑπολαβόντῳ, εἰάν δὲ γένηται, ταῦρον, ἔφη ὁ Γεράδας, ἐκλίνει μέγαν, ὃς ὑπερκύψας τὸ Ταῦγέλον ἀπὸ τῆς Εὐρώτα πίεται. Θαυμάσοντῳ δὲ ἐκεῖνε, ἢ φήσαντῳ, πῶς δ' ἂν γένοιτο βῆς τηλικῷτῳ; γελάσας Γεράδας, πῶς δ' ἂν, ἔφη, ἐν Σπάρτῃ μοιχὸς γένοιτο;*

The Praetor's Edict *de Postulando*, wherein *Feminas prohibet pro aliis postulare*, was grounded upon a particular Fact.

Origo introducta est a Carfania, improbissima femina, quae inverecunde postulans, et Magistratum inquietans, causam dedit edicto.

² D. 3. 1. 5.

³ VIII. 3.

*Valerius Maximus*³ calls her *Afrania* :

Afrania Licinii Buccionis Senatoris uxor, prompta ad lites contrahendas, pro se semper apud Praetorem verba fecit, non quod advocatis deficiebatur, sed quod impudentia abundabat. Itaque inusitatis foro latratibus assidue tribunalia exercendo, muliebris calumniae notissimum evasit exemplum.

The *SCtum Macedonianum*, which restrained Loans to *Filijfam*. became a general Law to the Romans

Vnius ob noxam, et furias——

⁴ D. 14. 6. 1. viz. the Usurer *Macedo*⁴. It was these particular Facts, that gave occasion to a general Law. Which leads me to my next Observation, viz.

III.

Law ought to speak a general Language. It is possible, that few such Women could be found as *Carfania*, and that many Bankers would act with more Integrity than *Macedo*. Yet the Law, unacquainted with moral Characters, or rather inattentive to the Part which *Titius* or *Sempronius* would take in their private Deportments, considers only the Impropriety of the Fact, and forbids the Practice universally. And I wonder how a very considerable Civilian⁵ should endeavour to account for, what he calls, the seeming Rigor and Absurdity of involving both Good and Bad under one general Censure. For where is the Absurdity of restraining those by a positive Law, who were already restrained by their own natural Dispositions? or how is a Censure past upon *Titius* or *Sempronius*, in the Brand it sets upon *Macedo*?

⁵ Voet. ad
Fandect. I.
§. 5.

* *Dictum memorabile asseratur Geradae Spartani ex vetustissimis. Qui cum interrogaretur ab hospite quo pacto punirentur adulteri apud Spartanos, Nemo, ait, apud nos existit adulter. Subiciente autem hospite, quod vero, si existeret? Taurum, inquit Geradas, ingentem pendit, qui porrecta cervice super Taygetum montem ex fluvio Eurota biberet. Eo deinde admirante, et dicente, quo pacto ullus ejusmodi bos potuisset reperiri? quo pacto, inquit, in Sparta reperiretur adulter?*

He would have done better, had He attempted to justify some Inequalities which the Law is liable to, in those general Suppositions which It is sometimes obliged to make. As for Instance, when it is forced to involve several under one *Common* Incapacity, to which *Particulars* may not be subject. The Rule or Maxim of Law, is

Nullum esse Impuberis Judicium.

And therefore *All* Minors are subjected to the Power of the Guardian, under this general Consideration of their Imbecillity; though it may happen, and doubtless very frequently does, that some may have Discretion enough to act for themselves.

And yet here this Inattention of Law is justifiable, because its Attention would be impracticable.

It is not to be expected, that It should comprehend all possible Cases. It must therefore be confined to those things which happen *plerumque*; and what falls out contrary to those general Phaenomena, is never regarded⁶.

*Neque Leges, neque SCta ita scribi possunt, ut omnes casus, qui quandoque inciderint, comprehendantur: sed sufficit ea, quae plerumque accidunt, contineri*⁷.

⁷D. 50. 17.
64, and 114.

*Jura constitui oportet, ut dixit Theophrastus, in his quae ἐπὶ τὸ πλεῖστον, id est, ut plurimum, accidunt, non quae ἐκ παραλόγου, id est, ex inopinato*⁸.

⁷D. 1. 3. 102.

⁸l. 3. eod.

*Ex his quae forte uno aliquo Casu accidere possunt, Jura non constituuntur*⁹.

⁹l. 4. eod.

*Nam ad ea potius debet aptari Jus, quae et frequenter, et facile, quam quae perraro eveniunt*¹.

¹l. 5. eod.

*Τὸ γὰρ ἅπαρ ἢ δις, id est, Quod enim semel aut bis existit, ut ait Theophrastus, παραβαίνουσιν οἱ νομοθέται, id est, praetereunt Legislatores*².

²l. 6. eod.

According to that elegant saying of *Agatho*, preserved to us by *Aristotle*³:

Εἰκὸς γίνεσθαι πολλὰ καὶ παρὰ τὸ εἰκός^{*}.

³Poet. Cap. 18.

IV.

I know not, whether I shall be understood, when I add in the next place, that a Law ought to be *Universal* in its Influence, as well as *General* in its Language. I explain myself thus: As in the last Case, the

^{*} *Verisimile est, multa fieri etiam praeter verisimile.*

Act of one Man involved a Community under a general Interdict, from which none are *exempted*, so the Law in its milder Dispensation never intends to confer a Benefit upon One Person in particular, from which the rest are *excluded*.

For why should a whole People meet to make a Law for one Man? It was moreover a Law of the XII. Tabb.

PRIVILEGIA NE IRROGANTOR.

Doubtless from a Constitution of *Solon*, recorded by *Demosthenes*, and others:

ΜΗΔΕ ΕΠ ΑΝΔΡΙ ΝΟΜΟΝ ΕΞΕΙΝΑΙ ΘΕΙΝΑΙ ΕΑΝ ΜΗ ΤΟΝ
ΑΥΤΟΝ ΕΠΙ ΠΑΣΙΝ ΑΘΗΝΑΙΟΙΣ⁴. *

⁴ Demosth. c.
Timocrat.
Tom. II.
Edit. Cant.
pag. 386.
⁵ D. 1. 3. 1.
C. 1. 14. 3.

Thus *Lex* is defined *Commune Præceptum*, *Generale Jussum*, etc⁵. and Laws therefore made in favour of one particular Person, as the *Lex Manilia* concerning *Pompey's* Command, the Law *de Reditu Ciceronis*, de *Caede Clodii*, are not so properly *Leges* as *Privilegia*.

Lex est generale Jussum Populi aut Plebis, rogante Magistratu. Ea Definitio si probe facta est, neque de Imperio Cn. Pompeii, neque de Reditu M. Ciceronis, neque de Caede P. Clodii Quaestio, neque alia id genus Populi Plebisve jussa, Leges vocari possunt. Non sunt enim generalia Jussa: neque de universis Civibus, sed de singulis concepta: quocirca Privilegia potius vocari debent; quia Veteres privaverunt, quae nos singula dicimus: quo verbo Lucilius in primo Satyrarum libro usus est.

⁶ Gell. x. 20.

—————*Abdomina Thynni*
*Advenientibus priva dabo cephalaeaque carne*⁶.

I do not know how it came about, that *Festus* attributes to *ROGATIO* all the Properties of *Privilegium*. It cannot be true in any Light that *Rogatio* ever expressed a *Privilege* among the Romans, in Opposition to a *general Law*. But the Mistakes of that Author are neither few, nor inconsiderable.

V.

The Matter of Law should be *Possible*, *Reasonable*, and *Useful*. The First of these recommends itself so strongly, that it would be ridiculous to urge it. For who sees not at first Sight the extreme Barbarity of exacting

* *Neque cuiquam in unius viri gratiam Legem ferre liceat, nisi eadem ad Omnes Athenienses pertinere possit.*

under a Penalty from another, what He is not able to render? And of expecting an Execution above the reach of his Faculties?

But this is not all. A Law should oblige not only to what is *Possible*, but also to what is *Fair* and *Reasonable* in its own nature. For it is some degree of Barbarity also, to expect the Performance of what Human Nature is *averse* to, as well as *unequal* to. Law, says *Grotius*⁷, ought to be enacted *cum sensu Humanae Imbecillitatis*.

⁷ I. 4. 7. 2.
Add. III. 23.
5. 3.

But the *Humanity* of Law would deserve a Treatise by itself. And there might be considered, in the first Instance, that great Stroke of Nature, that Requisite in all Law whatsoever, *viz.* To temper and proportion the Weight of Punishment to the Malignity of Guilt; and not to suppose with a Stoical Severity,

*tantundem ut peccet idemque,
Qui teneros Caules alieni infregerit horti,
Et qui nocturnus sacra Divum legerit*⁸.

⁸ Hor. I. Sats.
III. 115.

This is doing something. But there might be considered moreover that general Humanity and Tendernefs, that Condescension to our Natures, which gives the Colour, the Complexion, to a System of Law, and is easier to be imagined, than described. Let any one acquaint himself with the sanguinary System of *Draco*, and then view it as tempered with the Philosophy of *Solon*, and the softer Refinements of a better Age: and He will comprehend what I am saying. Let him look with the Eye of Speculation upon an Establishment, that directs *not to see the a Kid in his Mother's Milk*⁹: *not to muzzle the Ox, when he treadeth out the Corn*¹: when our Brother's Cattle go astray, or fall down by the way, *not to hide ourselves from them*²: That acquits the betrothed Damsel who was debauched at a Distance, and out of Hearing, and pronounces in Her *no Sin worthy of Death*, upon this compassionate Suggestion, *For he found her in the Field, and the betrothed Damsel cried, and there was none to save her*³; I say, these Reflections will inform him of my Meaning.

A Consideration of the general Temper and Disposition of Law will be found of great Advantage to Civil Life, and will supply us with very useful Theory. It is reaching the Heart in the first Instance, and making ourselves masters of the Genius of a whole People at once, by reading them in that Glass which represents them best, the Turn of their Civil Institutions. There is scarce a Passage in all Antiquity more happily imagined, than that where *Demosthenes* tells us, that the Laws of a Country were considered as the *Morals of the State*, and the *Character* of a whole People taken collectively:

Δεῖ τοίνυν ὑμᾶς τὸτο σκοπεῖν, ὅτι πολλοὶ τῶν Ελλήνων πολλάκις εἰσὶν ἐψηφισμένοι τοῖς νόμοις χρῆσθαι τοῖς ὑμετέροις· ἐφ' ᾧ φιλοτιμαῖδε ὑμᾶς εἰκότως. ὁ γὰρ εἰπὴν τινὰ φασιν ἐν ὑμῖν, ἀληθὲς εἶναι μοι δοκεῖ· ὅτι τὰς νόμους ἀπαντες ὑπελήφασιν ἐν ὑμῖν, ὅποι σωφρονέσιν, ΤΡΟΠΟΥΣ ΤΗΣ ΠΟΛΕΩΣ ΕἶΝΑΙ. χρὴ τοίνυν σπουδάζειν ὅπως ὡς βέλτιστοι δοξῶσιν εἶναι.*

* C. Timocr.

T. II. Ed.

Cant. p. 439.

† See Not. ad

Leptin De-

mothensis.

pag. 12. l. 2.

Ed. Cant.

* Leges Hhoeli

Dea. Lond.

1730. Fol.

This is elsewhere by *Demosthenes*, and by other Writers⁵, very elegantly called τὸ ΗΘΟΣ τῆς πόλεως. Thus, We cannot but observe in the Laws of Greece and Rome, a great Culture and Polish of the Understanding, the Nature and Passions of the Human Mind well studied, and a great Attention paid to the Lectures of Philosophy. The lazy and voluptuous Asiatic acts under Principles of Law, which are directly suited to his Genius and Complexion. The Simplicity and Frugality of one Set of our Ancestors is seen in a System which they have left behind them⁶; and Tenures, Services, Rules of Descents, and Conditions of Estates, speaks the Military and Feudal Spirit of the other.

This Contemplation of Law, and Systems of Law, with the Eye of Philosophy, may also have its Use in other respects. It may lead us into the Secret of the Compiler, acquaint us with the Tendency of his Doctrine, and give us a Taste of that Philosophy which He is endeavouring to insinuate. It has been imagined, that nothing else was intended by the Abstinence from Animal Food, which was enjoined a considerable School of Antiquity, but an artful and elegant Recommendation of Humanity;

⁷ Plutarch de

Solert. Anim.

Add. Traet.

Philonis π. φ.

λαοθροπίας.

Tom. II.

Edit. Mangey.

μελέτη πρὸς τὸ φιλόανθρωπον καὶ φιλόκτιστον⁷. †

It is thus, that *Plutarch*, in a very fine Passage, condemns the Inhumanity of *Cato Major* for selling his old useless Slaves, to save the Expence of their Maintenance, and concludes his Reflection in these words:

Οὐ γὰρ ὡς ὑποδήμασιν ἢ σκεύεσι τὴν ψυχὴν ἔχουσι χρῆσέον, κοπένῃα καὶ κατατριβέντα ταῖς ὑπηρεσίαις ἀπορρίπτοντας, ἀλλ' εἰ διὰ μηδὲν ἄλλο, ΜΕΛΕΤΗΣ ΕΝΕΚΑ ΤΟΥ ΦΙΛΑΝΘΡΩΠΟΥ προεθιζέων ἑαυτὸν ἐν τέτοις πρᾶτον εἶναι καὶ μείλιχον. ἐγὼ μὲν ἔν ἐδὲ βῆν ἂν ἐργάτῳ διὰ γῆρας ἀποδοίμῳ, μήτιγε πρεσβύτερον ἄνθρωπον — †

* Illud igitur vobis est etiam considerandum, multos Graecorum saepe decrevisse, vestris utendum esse Legibus: id quod vobis laudi haud injuria ducitis. Nam verum illud mihi videtur, quod quendam apud vos dixisse ferunt: omnes cordatos in ea esse sententia, ut Leges nihil aliud esse putent, quam mores Civitatis. Danda igitur est opera, ut eae quam optimae esse videantur.

† Exercitatio quaedam quae ducat ad Humanitatem et Misericordiam.

‡ Neque enim Animantibus est ut calceis et utensilibus utendum, quo fessa et ministeriis pro-jiciamus attrita: sed si nihil aliud, meditandae certe humanitatis causa debemus in his nos ante ad mansuetudinem et benignitatem assuefacere. Equidem ne bovem quidem ego operarium, ob senium, nedum affectum aetate hominem —

So the Athenian Legislators reasoned, when they guarded the Persons of their Slaves with the same Diligence as their own. One would wonder at first hearing, says *Aeschines*⁸, τί δῆποτε τῷ νόμῳ τῷ τῆς ὑβρεως προσε-⁸ c. Timarch. γράφη τῆτο τὸ ῥῆμα, τὸ, ΤΩΝ ΔΟΥΛΩΝ. τῆτο δὲ, εἰὼν σκοπῆτε, εὐρήσεθε, ὧ^{Tom. II. Edit.} ἄνδρες Αθηναῖοι, ὅτι τῆτο πάντων ἄρμα ἔχει. ἔ γὰρ ὑπὲρ τῶν οἰκετῶν ἐσπᾶδασεν^{Cant. De-} ὁ νομοθέτης, ἀλλὰ βελάμεν ἡμᾶς ΕΘΙΣΑΙ πολὺ ἀπέχειν τῆς τῶν ἐλευθέρων^{moth. p. 17.} ὑβρεως, προσέγραψε μὴδ' εἰς τὰς δέλους ὑβρίζειν.*

My Reader may find this Benefit, at least, from these Remarks, that He will observe Law sometimes to consist of moral Lectures, as well as practical Injunctions; and to what I have observed above⁹ may add⁹ pag. 45. another Cause, *why the Constitutions of our Fore-Fathers, at first blush, and to a less considerate Inquirer, do not always carry their Reason and their Evidence along with them.*

But I proceed to support what I laid down at the Beginning of this Head, “That a Law should not only be *possible*, and *reasonable*, but “last of all, directed to the *Utility* and *Emolument* of those who are directed by it.” I mean, in its general Tendency and Destination; because it is very possible, that Particulars may suffer, when the Public is benefited. For there the Law never descends: but her Theorems and her Language are as general, as it is possible.

Nulla Lex satis commoda omnibus est: Id modo quaeritur, si majori parti, et in summam prodest¹.

¹ Liv. XXXIV.

This also I spoke to, in some measure, in the place last cited², Where³ I observed, that though Reason (*i. e.* Utility) and Law were connected, yet our Conduct derived its Influence, not from the Reason, but from the Authority: ² pag. 45.

Neque enim in Lege Ratio quaeritur, sed Auctoritas³.

³ Hieron. Dial. 2. c. Pelagianos. pag. 513. Tom. II. Ed. 1706.

Something of the general Utility of Law, and the Design of its Operations, We have seen above⁴, and the Ancients are full of this Persuasion.

Omnes Leges ad commodum Reip. referre oportet, et eas ex Vtilitate communi, non ex scriptione, quae in literis est, interpretari. Ea enim virtute et sapientia majores nostri fuerunt, ut in Legibus scribendis nihil sibi aliud, nisi Salutem atque Vtilitatem Reip. proponerent——Nemo enim Leges Legum causa salvas esse vult, sed Reipublicae⁵.

⁴ pag. 95.

Nam qui Jus Civile contemnendum putat, is vincula revellit, non modo judiciorum, sed etiam Vtilitatis, Vitaeque communis⁶.

⁵ Cic. I. de Invent. 38.

⁶ Id. pro Caec. cin. § 25.

* —statim miretur, qua de causa Legi contumeliae etiam servorum nomen sit adscriptum. Id vero si considerabit, Athenienses, omnium rectissimum esse invenietis. Neque enim servi tantae curae fuerunt Legislatori, sed quia nos consuefacere voluit ut a contumelia Ingenuorum magnopere nobis temperaremus, adscripsit, ne servis quidem contumeliam esse faciendam.

There is upon this Topic a Passage not to be neglected in *Plutarch's* Life of *Solon*:

Τὸν οὖν Ἀνάχαρσιν πυθόμενον, καταγελαῶν τῆς πραγματείας Ἐ Σόλωνος, οἰόμενα γράμμασιν ἐφέξεν τὰς ἀδικίας ἔ πλεονεξίας τῶν πολιτῶν, ἃ μηδὲν τῶν ἀραχνίων διαφέρειν, ἀλλ', ὡς ἐκῆνα, τὰς μὲν ἀσθενεῖς ἔ λεπτοὺς τῶν ἀλισκομένων κατέξεν, ὑπὸ δὲ τῶν δυνατῶν ἔ πλεσίῳ διαρράγησεν. τὸν δὲ Σόλωνα πρὸς ταῦτα φασὶν εἰπεῖν, ὅτι ἔ συνθήκας ἀνθρώποι φυλάττειν ἅς οὐδετέρῳ λυσιτελεῖς ἐς πλεονεξίαν τῶν θεμένων. ἔ τὰς νόμους αὐτὸς οὕτως ἀρμόζεται τοῖς πολιταῖς, ὥς πᾶσι τοῦ πλεονεξομεῖν βέλτιον ἐπιδείξαι τὸ δικαιοπραγεῖν.*

This Notion by some old Writers has been carried to that extravagant Height, as to be fatal to their Conceptions of *Justice* and *Morality*. As if what *Horace* advanced⁷, had been true in its rigid Signification,

Atque ipsa Vtilitas, Jusli prope Mater et Aequi,

and all Justice and Injustice, Right and Wrong, had been only other words for Conveniency and Ill-Accommodation. This Point has been well studied, and well confuted, by *Grotius*⁸, *Pufendorf*⁹, and their Commentators, to whom I refer my Readers for their farther Satisfaction.

⁷ 1. Serm. III. 98.
⁸ Prolegom. Jur. B. et P.
⁹ de Jur. N. et G. II. 3. 10, 11.

VI.

The Contents of a Law ought to be of a Legal Nature. A Legislator ought to be directed, not only ~~but also~~ by the Rules of his Nature, which must never be contradicted, but also by the established Rules of his Country. The Romans in particular, no bad Models to copy after, were so delicate in this respect, that We frequently find these Clauses in their Acts, to guard against any Oversight of this Nature:

SI QUID IVS NON FVIT ROGARI EIVS HAC LEGE NIHIL ROGATVM.

This was so common a Form with them, that in the Old Note-books, which are still preserved of that People, We find this among them:

E. H. L. N. R. i. e. Ejus hac Lege nihil rogatur.

And

SI QUID CONTRA ALIAS LEGES EIVS LEGIS ERGO LATVM ESSET VT EI QVI EAM LEGEM ROGASSET IMPVNE ESSET¹.

¹ Paulus Diaconus apud Putschium. col. 1599.
Cic. III. ad Attic. 23.
Brissou. de Formul. II. p. 138.
Pithaei II. Subseciv. 15.

* Enimvero re intellecta, derisisse Anacharsin molitionem Solonis, qui civium se injurias et cupiditates putaret refraenaturum scriptura, quae nihil a telis araneorum differret, sed, sicut illae, imbecillos tenuesque esset, quos comprehendisset, retentura, validos vero et pecuniosos transmissura. Quibus Solonem ferunt occurrisse, stare hominem etiam pactis conventis, quae neutri parti expediat violare; ac Leges ita se temperare civibus omnibus, ut futurum perspicuum esset, antiquius esse colere justitiam quam jus violare.

VII. It

VII.

It was moreover the Attention of the *Licinian* and *Aebutian* Laws, that no one proposing a Bill, relating to any Trust, Power, or Profit, should convey that Trust, etc. to himself, or any of his Relations:

*Leges enim sunt veteres, neque eae Consulares, siquid interesse hoc arbitramini, sed Tribunitiae, vobis majoribusque vestris gratas atque jucundas. Licinia est Lex, atque altera, Aebutia, quae non modo eum qui tulerit de aliqua curatione ac potestate, sed etiam collegas ejus, cognatos, affines excipit, ne eis ea potestas curatiove mandetur*³.

³ Cic. II. Agrar. 8.

*Verum sit. quid? Operum publicorum exactio: quid? Nominis inscriptio, tibi num aliud videtur esse, ac meorum bonorum direptio? praeterquam quod ne id quidem per Legem Liciniam, ut ipse Tibi curationem ferres, facere potuisti?*⁴

⁴ In pro Domo. § 20.

VIII.

It was provided *Lege Caecilia-Didia*, that No one should propose a Law *per Saturnam*: i. e. concerning several Things at once of a different Nature.

*Quae sententia Caeciliae Legis et Didiae, nisi haec, ne populo necesse sit in conjunctis rebus compluribus, aut id quod nolit accipere, aut id, quod velit, repudiare?*⁵

⁵ Id. ibid.

*Qui agent, non plus quam de singulis rebus semel consulunto*⁶.

⁶ Id. III. de Legg. 4.

This is corruptly called by some Writers *LEX SATYRA*.

Alii autem dictam putant a Lege Satyra, quae uno rogatu multa simul comprehendat: quod scilicet et Satyra carmina multa simul et poemata comprehenduntur. Cujus Legis Lucilius meminit in primo:

Per Satyram Aedilem factum, qui Legibus solvat,

*Et Sallustius in Jugurtha. Deinde quasi per Satyram sententiis exquisitis in deditionem accipitur*⁷.

⁷ Diomedes Grammaticus, l. 3. col. Edit. Putsch. 483.

IX.

Several of these Provisions in the Roman Constitution, which I have lately mentioned, particularly that Number VI. were calculated to prevent, what the Ancient Spirit of Legislation was so averse to, a *Frequency of Repeal*: and here let me observe something *de Legum Poenitentia*.

Add. Turneb. XXVI. Adversar. 34. Schott. I. Observ. 2.

The famous Instance of this Aversion among the *Locrians*, is so well known, especially to all Readers of *Demosthenes*, that I might be excused the Quotation. But here it follows from that Writer⁸:

⁸ Tom. III. Edit. Cant.

Βέλομαι δ' ὑμῖν, ὦ ἄνδρες δικασταί, ἐν Λοκροῖς ὡς νομοθεῖσιν, διηγῆσθαι. ἔδεν γὰρ χεῖρας ἔσεσθαι παράδειγμά τι ἀκηκοότες· ἄλλως τε καὶ ὃ πόλις δυνουμένη χρῆται. ἐκεῖνοι γὰρ ἔτι οἶονταί· δεῖν τοῖς πάλαι κειμένοις χρῆσθαι νόμοις, καὶ τὰ πάτρια περισέλλειν, καὶ μὴ πρὸς τὰς βελήσεις, μηδὲ πρὸς τὰς διαλύσεις τῶν ἀδικημάτων νομοθεῖσθαι, ὡς τε ἂν τις βέληται νόμον καινὸν τίθεναι, ἐν βρόχῳ τὸν τράχηλον ἔχων νομοθεῖ· καὶ εἰ μὲν δόξῃ καλὸς καὶ χρήσιμος εἶναι ὁ νόμος, ζῇ ὁ τιθεὶς καὶ ἀπέρχεται, εἰ δὲ μὴ, τέθνηκεν, ἐπιασμένῳ τῷ βρόχῳ. Ἐ γὰρ τοὶ καινὸς μὲν ἐτολμῶσι τίθεναι νόμους· τοῖς δὲ πάλαι κειμένοις ἀκριβῶς χρῶνται.*

There was but one Instance of a Repeal in this Country, continues my Author, for the space of two hundred Years, and that upon a very extraordinary Occasion.

It was a Law of the Locrians, that whoever should strike out an Eye of a Fellow-Subject, should be punished with the loss of one of his own: and this not redeemable by any Composition whatsoever. There happened to be a Misunderstanding between two Citizens, one of which was already blind of one Eye: and his Adversary threatened him with the loss of the other. Upon the Reflection of the great Inequality in this case, and imagining that a total Blindness was as bad as any thing he could suffer from the Penalty, He ventured to propose a Law, and carried it:

Εάν τις ἕνα ἔχοντα ὀφθαλμὸν ἐκκόψῃ, ἄμφω ἀνικόψαι παραχρῆν, ἵνα τῇ ἴσῃ συμφορᾷ ἀμφοτέρωι χρῶνται.†

It is almost impossible to describe with exactness the Care which was observed by the Athenians in Affairs of this nature. The Oration of Demosthenes last cited, will furnish many Proofs of this Attention, and shew the Formality of Process which was observed upon the Introduction of a new Law, and the Repeal of an old one.

Hence it was, that we read so frequently in the Authors of that Country of the *Γραφαὶ παρὰ νόμων*, the public Charge against such as should make any Motion not consistent with the standing Rules of the Constitution. In which Case the Penalty was very considerable.

* Narrabo autem vobis, judices, quo pacto Locris leges ferre soleant, nihil enim vobis nocuerit exemplum aliquod audivisse, tale praefertim, quo laudata respublica utitur. nam illi usque adeo censent veteribus legibus utendum, et instituta patria ornanda esse, non ad cujusvis libidinem et injuriarum impunitatem leges ferendas, ut si quis legem novam rogare velit, collo in laqueum inserto id facere cogatur: quae lex si honesta et utilis videtur, auctor ejus vivit et abit; sin minus, periit conscripto laqueo. proinde novas rogare leges non audent: sed veteribus religiose utuntur.

† Siquis oculum lusco excusserit, illi contra utrumque eripiendum, ut pari calamitate utrique conficiantur.

And not only so, but the Law was open against such as should not only propose an *illegal* Bill, as I may so call it, but also a *less expedient* one. But, that the Terror of the Law might not be immortal against Offenders in this Particular, the Proposer had his *Quietus* after the Expiration of one Year, but an Inquisition lay against this Proposal for ever.

Hence also, among other Constitutions to this Purpose, We find the following :

Ἐναντίον δὲ νόμον μὴ ἐξεῖναι τιθέναι τῶν νόμων τῶν κειμένων μηδενί. εἰάν τις λύσας τινὰ τῶν νόμων τῶν κειμένων ἕτερον ἀνελθῇ μὴ ἐπιήδειον τῷ Ἀθηναίων δήμῳ, ἢ ἐναντίον τῶν κειμένων τῶν γραφῶν εἶναι κατ' αὐτῶν κατὰ τὸν νόμον ὃς κεῖται εἰάν τις μὴ ἐπιήδειον θῇ νόμον.*

⁹ Ibid. pag. 377.

This Tendernefs for their old Laws is in no Instance so visible, as in that Unwillingnefs to part with them, but on the best and most satisfactory Conclusions. It was upon this Principle, That new Laws, Decrees, etc. among the Athenians, were said to be *scanned, searched and examined*, δοκιμάζεσθαι, like Candidates for an Office, before they admitted them, and the same Process observed, before they set others aside : That their Authors speak of LAWS, as they would do of DEFENDANTS, or parties in an ACTION ; That We hear of them being *cited into Court, standing Trial*, and, in consequence of that, either *condemned, or acquitted*, which the Passages here quoted will testify :

Τῷτο τὸ Δίκαιον πολλοὶ τῶν ἐν τοῖς νόμοις, ΩΣΠΕΡ ΡΗΤΟΡΑ, ΓΡΑΦΟΝΤΑΙ ΠΑΡΑΝΟΜΩΝ.¹ †

¹ Aristot. I. Polit. 6.

—Νόμον, ὃν Τίμαρχος ἔτασεν ἢ ἕτεροι τοιοῦτοι ῥήτορες συνελθόντες, ΓΕΓΡΑΜΜΕΝΟΙ εἰσὶ μὴ ἐπιήδειον εἶναι.² ||

² Aesch. c. Timarch. pag. Edit. Cant. 23.

See here the Difference between ΓΡΑΦΕΣΘΑΙ νόμον, and ΑΠΟΓΡΑΦΕΣΘΑΙ.

Τὸν δ' ἐν Αἰγύπτῳ νόμον ἃρ' ἐκ εἰκότως ὑμῖν ΑΠΟΓΡΑΨΑΣΘΑΙ δοκῶσιν εἶναι τῶν Ἑλλήνων, ὃς κελεύει τὴν ἔγκυον, ἀν' ἁλῶ θανάτῳ, μέχρι τέκῃ, φυλάττειν.³ ‡

³ Plutarch. de sera Numinis vindicta.

* Contrariam vero ferre Legem receptarum Legum ulli, nemini liceat. Siquis vero Legem jam latam antiquans, alteram ejus vicem rogarit, quae utilis non sit Atheniensium Populo, aut contraria sit alicui eorum, quae jam obtinet, ei dicam scribito, secundum Legem, quae in eos lata est, qui damnosam Legem rogaverint.

† Hoc Jus multi ex iis qui in Legibus versantur, vocant in judicium et crimen Rogationis contra Leges latae, quo pacto vocarent oratorem.

|| — Legem, quam Timarchus et alii hujusmodi Oratores per conspirationem, quasi e Rep. non esset, in jus vocarunt.

‡ Legem vero Aegyptiacam, quae jubet, ut poena mulieris praegnantis, ubi capitis damnata fuerit, usque ad partum differatur, annon multi ex Graecis jure vobis videantur descripsisse ?

Right. It was described or copied by many of the Greek States, and others also. We find something like it in the Laws of *Numa*, and it has a Place in the Digest ⁴.

⁴ D. i. 5. 18.
48. 19. 3.
Add. Phil.
Judaeus, T. II.
pag. 398.
Ed. Mangey.
Quintilian.
Declam. 277.
Aelian. V.
V. H. 18.

Menag. A-
moen. J. C.
C. XXI.

⁵ See Demosth.
c. Aristocr.
pag. 291.
Tom. III.
Edit. Cant.
and Not. ad
Aeschin. pag.
23. l. 15.
Tom. II.

⁶ Demosth. c.
Timocrat.
pag. 368.
T. III. Edit.
Cant.

⁷ Ibid. pag.
369.

⁸ Ibid. pag.
375.

⁹ Demosth.
c. Neaer.
pag. 564.
Tom. III.
Ed. Cant.

¹ Demosth. c.
Aristocr. pag.
291 Tom. III.
Ed. Cant.

To proceed: As they used ΓΡΑΦΕΣΘΑΙ νόμον i. e. *To indict a Law*, so Νόμος, or rather Ψήφισμα, was said ΑΓΩΝΙΖΕΣΘΑΙ, when it stood Trial, ΦΕΤΓΕΙΝ, upon the same Occasion, ΑΠΟΦΕΤΓΕΙΝ, or ΝΙΚΑΙΝ, when it was acquitted: and ΕΙΛΕ τὸ ψήφισμα was the Term, when the Accuser on the contrary, got the better ¹.

Εἰ ΓΡΑΨΑΜΕΝΟΙ ΤΟΝ ΝΟΜΟΝ, Ἐ ΕΙΣΑΓΟΝΤΕΣ ΕΙΣ ΤΜΑΣ.*

ΓΡΑΦΟΝΤΑΙ ΤΟ ΨΗΦΙΣΜΑ, εἰς ΤΜΑΣ ΕΙΣΗΛΘΕΝ, κατὰ τὰς νόμους ΕΔΟΞΕΝ εἰρηθῶτα, καὶ ΑΠΕΦΥΓΕΝ⁷.†

Ο νῦν ΑΓΩΝΙΖΟΜΕΝΟΣ νόμος⁸.‡

ΓΡΑΨΑΜΕΝΟΣ ΠΑΡΑΝΟΜΩΝ ΤΟ ΨΗΦΙΣΜΑ ——— Ἐ εἰσελθὼν εἰς τὸ δικαστήριον ——— ψευδεῖς μάρτυρας παραχόμην ——— ΕΙΛΕ ΤΟ ΨΗΦΙΣΜΑ⁹.||

Τίς γὰρ ἔ γράψει γε θαρρῶν πάλιν, ἥνίκα ἂν ἡ τῆτο [ψήφισμα] ΑΠΟΠΕ-ΦΕΤΓΟΣ — ΕΑΛΩΚΟΤΩΝ ΨΗΦΙΣΜΑΤΩΝ — ΑΠΕΦΥΓΕ¹.**

Upon the whole, it is the Effort and Destination of Law to be *perpetual*: and the same Constancy and Resolution which distinguishes a Man in his private Character, is also a *Distinction* of Law in its public. But it is not the Condition or Circumstance of our Nature. The Improvements of Life, and the Lessons of Experience, will work an Alteration in both Characters alike. Time and Maturity

*Chaoniam pingui glandem mutavit arista,
Poculaque inventis Achelœia miscuit uvis.*

And the same Reason holds good in Law, as We know by Experiment, and as the Histories of all Nations and of all Countries can readily inform us.

Non ignoras legum opportunitates et medelas pro temporum moribus et pro Rerumpub. generibus, ac pro utilitatum praesentium rationibus, proque vitiorum, quibus medendum est, fervoribus mutari atque flecti neque uno statu consistere, quin, ut facies coeli ac maris, ita rerum atque fortunae tempestatibus varientur. Quid salubrius visum est

* *Legem accusatam et vestris sententiis subiectam.*

† *Accusant decretum: sistitur coram vobis: judicatur factum esse secundum Leges: absolvitur.*

‡ *Lex quae nunc apud Judices est.*

|| *Id decretum violatarum Legum rerum fecit, et forum ingressus, testibus produxis decretum damnavit.*

** *Quis enim non securo animo denuo scribet, si hoc [decretum] fuerit absolutum? — damnatis decretis — est absolutum.*

Rogatione

Rogatione illa Stolonis iugurum de numero praefinito? Quid utilius Plebiscito Voconio, de coercendis mulierum hereditatibus? quid tam necessarium existimatum est propulsandae civium luxuriae, quam Licinia et Fannia, aliaeque quidem Leges sumptuariae? Omnia tamen haec oblitterata et operta sunt, Civitatis opulentia quasi quibusdam fluctibus exesuantis.

² Gell. XX. 1.

It was well said by Zaleuchus, if what is attributed to Zaleuchus may be relied upon :

Ἦτ' ἀνθρώπων ἡτῶσθαι τὰς κεῖμενες νόμους, ἢ καλὸν, ἐδὲ συμφέρον. ὑπὸ δὲ νόμῳ βελτίον. ὡς ἡτῶμενον καὶ ἀκράτεισθαι ἢ καλὸν ἢ συμφέρον.³ *

³ Stobaeus.

However all States should be careful how they rescind their own Acts, or those of their Fore-fathers. For it was finely expressed by *Augustus* : ⁴ Dio Cassius. LIII. 10.

Τὰ ἐν ταύτῳ μένοντα, καὶ χείρω ἢ, συμφορώτερα τῶν αἰὲ καίνιστομενῶν, καὶ βελίω εἶναι δοκῇ. †

And this leads me to consider

X.

The Effect of Laws in their Operations upon one another.

In the Imperial Constitutions We frequently find such Expressions as these :

Hac lege perpetuo valitura sancimus.

And it is not unusual, that at the End of several Statutes and Ordinances, the Authority which directs them, should express his Desire of their Perpetuity, by a special Clause *de non abrogando*, viz. That whatever shall be enacted in Contradiction to the Disposition of Law in this particular Statute, shall be null and void.⁵

⁵ Pufendorf. I. 6. 6.

But This is only a Proof of their Wishes, not an Instance of their Power. For how *absurd* would it be, to use the Words of my last-cited Author, *that a former Decree should disannul a latter; since absolute Power cannot bind and restrain in itself; and since that which is in its own Nature subject to change, cannot be made fixed and irrevocable?*

And yet we find it to be Law :

*Leges et Constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari.*⁶

⁶ C. 1. 14. 7.

If therefore, from the last-cited Text, Law cannot operate *in praeteritum*, and, if what We had just before established, be true, that it cannot influence or direct *in futurum*, what is its Power and Efficacy?

* *Ab hominibus vinci Leges, neque bonum, neque utile est: at Legi meliori eas velut victas cedere et bonum est et utile,*

† *Quae in eodem manent statu, etiamsi pejora sint, magis profunt, quam quae subinde, etiamsi in melius, moventur.*

These

These two positions are true, and yet not inconsistent. The Operation of Law is naturally forward. Law is a Direction of Manners, prescribing what is to be avoided: but they are things *in futuro* only that can possibly come under that Description, *i. e.* can be avoided or not. It is a Lesson or Rule of Conduct, wherein each man is told, what is expected from him *for the future*; but It is altogether unconcerned as to the Part in which that Man acted *before*. And how should it be otherwise? For as Positive Law is only a Declaration of Will, and is generally concerned in prohibiting something which before was not prohibited, how great would be the absurdity to punish a Transgression before it was declared to be so, and restrain an Evil, which, *ex Hypothesi*, is no Evil at all?

Quid enim Antiquitas peccavit, quae praesentis Legis inscia, pristinam secuta est Juris observantiam ⁷ C. 6. 23. 29.

In Lege Voconia non est, Fecit, Fecerit: neque in ulla praeteritum tempus reprehenditur—De Jure Civili si quis novi quid instituit, is omnia, quae ante acta sunt, rata esse non patitur? Cedo mihi Leges Atinias, Furias, ipsam, ut dixi, Voconiam, omnes praeterea de Jure Civili; hoc reperies in omnibus statui Jus, quo post eam Legem Populus utatur ⁸.

⁸ Cic. III. Verrin. 42.

But then This regards only the *Actions* of such as are subject to Law, not the *Disposition* of such as have a Power of forming it. And therein consists the Distinction of those two Principles, which I have laid down. For as no Previous Instituted Law of Man can prejudice or invalidate any future Constitution; so no Future Constitution can operate to the Prejudice of any past Action. It is an equal Absurdity, that Law in the one Case should *valere adventura*, or in the other, *ad praeterita*.

What I have said of the Prevalence of Law *in Futurum* only, will have its use in the following consideration. I have said, that no Law-giver was tied down to his own Resolutions, but that either He himself or Those that come after him, upon proper Emergencies, and upon proper Suggestions, might alter them for the public Advantage. It must however be understood with this Restriction, “That He cannot alter his Mind to
⁹D. 50. 17. 75. “another Man’s Disadvantage”, or amend a Law, which to another has “created a Right.” And even this Restriction wants to be restrained it self: For “As to that Man, he is bound; as to Others, not.” The Whole of this is best seen by Instance. As it is a Matter of Indifference, whether the State permits a man to dispose of his Effects by Will, or directs them in the Channel of Nature to the Heir at Law, I can suppose one of the Directions altered on a sudden, and Wills, for Instance, to be declared of no Force hereafter. Here many things will meet my Reader’s Observation, which I have been discoursing upon above, *viz.*

I. As

1. As either Way of Succession, *vel ex Testamento, vel ab Intestato*, is indifferent, the Law may direct either Course indifferently, and change its Mind uncontrollably.
2. Those who were in Possession of Property before, under the Operations of a Will, were in Possession of a Right, which no power can defeat by the Alteration of Judgment.
3. For if an Alteration of Judgment in the Legislator could defeat a Right created before, then a Law can *valere in praeteritum*, which We have seen to be absurd.
4. However, a Right thus created to *Titius* (for Instance) hinders not the Lawgiver from prescribing other Regulations to *Sempronius*. He is not tied down fatally to his own Conclusions, nor those of others.
5. But as there cannot be two Laws for two several People, since Law, as We have seen, must speak a *general* Language, the Effects only of the former Law live in *Titius*: But *Titius*, as well as *Sempronius*, is concluded by the new Law for future Events, which was all this new Law could engage for, in the person of *Sempronius*, as well as in the Person of *Titius*.

However it is not to be doubted, but that Laws may in some Sense, and in some particular Considerations, have a Retrospect. If a Law be introduced to explain or interpret an old one:

—*etiam secundam posuimus Legem, eadem valere sancientes—et in hanc quoque secundam nostram Constitutionem similiter adjecimus, oportere ejus legislationem et ad seniores referri tempora, exceptis illis causis, quas aut Judicialis Sententia, aut Transactio terminavit*⁹. ⁹ Nov. 19. pr.

If it be enacted *de rebus adhuc pendentibus*—If it be declarative of common Law, or of natural Law—If it should be introductive of an Exception or a Release: As for Example; If the legal Interest of Money should be lowered by a new Law, it is plain, that a *former* Act, (namely the Obligation for rendering a larger Interest) is dissolved by this Law, and a new one contracted. Many more Instances might be produced, and some may be found in a good Writer upon the Digest¹.

¹ Voet ad Lib.
I. Tit. III.
§ 17.

To proceed therefore in contemplating the mutual Effects of one Law upon another. We have seen in general, that a subsequent Law takes Place in Preference to a former one, which is contradicted by it. It may admit of some Doubt, should the first be a *special* or particular Constitution, and the other a *general* one. For That, by the Singularity of its Circumstance may be fairly supposed to have escaped the Notice of the Law-maker, being, upon the Matter, a Thing almost as much of fact as of Law; or being founded upon a particular and private Reason, which He has no Intention to controvert in his general Sanction, may, in many Instances, maintain its authority, where no *Non-obstante* is expressed, to
Y repeal

repeal or determine it. But there can be no Doubt, when a special Constitution succeeds a General one ².
²D. 48. 19. 41.
⁵⁰ 17. 80.

If it should fall out, that one Civil Sanction, by a particular Circumstance of Time, Place, or any unforeseen Incident, should clash with another ; or a Contradiction of Law subsist, where a Priority of Date, not recoverable through a Length of Practice immemorial, will not adjust the Preference; many Considerations have been offered to establish a Superiority. As, the general Rescripts of the Prince, or the Constitutions of a whole People prevail over the private Rules of a Fraternity or a Corporation—Those which concern the Regards of the Public, over the Regulations of private Property—A Law which enjoins, over that which barely permits—That which lays a Restraint, over that which directs—A Law guarded with a Penal Sanction, over that which is not—A Law with a greater Penalty, over that which has a less: with many more Cases of this nature.

Item, aut confessum est ex utraque parte Jus, aut dubium. Si confessum est, haec fere quaeruntur: utra Lex potentior: ad Deos pertineat an ad homines: ad Remp. an ad privatos: de honore, an de poena: de magnis rebus, an de parvis: permittat, an vetet, an imperet. Solet tractari et utra sit antiquior, et velut potentissima, utra minus perdat; ut in Desertore, et viro forti, quod illo non occiso Lex tota tollatur, occiso, sit reliqua viro forti alia Optio. Plurimum tamen est in hoc, utrum fieri sit melius, atque aequius, de quo nihil praecipit, nisi proposita materia, potest ³.

³ Quintilian.
 V. 7.

Primum igitur leges oportet contendere, considerando utra Lex ad majores, hoc est, ad utiliores, ad honestiores, ac magis necessarias res pertineat. Ex quo conficitur, ut si Leges duae, aut si plures, aut, quotquot erunt, conservari non possint, quia discrepent inter se, ea maxime conservanda putetur, quae ad maximas res pertinere videatur. Deinde, utra Lex posterius lata sit. Nam postrema quaeque gravissima est: Deinde, utra Lex jubeat aliquid, utra permittat. Nam id quod imperatur, necessarium: illud, quod permittitur, voluntarium est. Deinde, in utra Lege, si non obtemperatum sit, poena afficiatur, aut in utra major poena statuatur. Nam maxime conservanda est ea, quae diligentissime sancta est. Deinde, utra Lex jubeat, utra vetet. Nam saepe ea, quae vetat, quasi exceptione quadam corrigere videtur illam, quae jubet. Deinde utra Lex de genere omni, utra de parte quadam: utra communiter in plures, utra in aliquam certam rem scripta videatur. Nam quae in partem aliquam, et quae in certam quandam rem scripta est, propius ad causam accedere videtur, et ad judicium magis pertinere. Deinde ex Lege utrum statim fieri necesse sit; utra habeat aliquam moram et sustentationem. Nam id quod statim faciendum sit, perfici prius oportet ⁴.

⁴ Cic. II. de
 l. vent. 49.

I might moreover, under this Consideration, observe upon the use which a new Law may have in explaining or interpreting an old one. But this has in some measure been touched upon above, and it is also a Point which lies open to common Reflection.

XI.

Let us see something about the Sanction of Law. *A Perfect Law* consists of two Parts: a *Precept* and a *Commination*. As it is defined by *Papinian*⁵, not commonly *commune Praeceptum*, but also *delictorum Coercitio*. These are the two essential Parts of a Law: the *First* to mark out our Duty, and the *Second* to enforce our Obedience. And it is from the last, that Law properly receives its Force and Spirit. For was the Lawgiver only to direct or ordain, without being able to support his Orders, by inflicting some arbitrary and discretionary Pain upon the Transgressor, it would rather be *Counsel* than *Law*.

Therefore what has been brought from *Vlpian*, *Macrobius*, etc.⁶ relating to a less perfect Law, (*Minus quam perfecta Lex*⁷, which punishes, but not rescinds the Act) and a Law absolutely imperfect, (*in qua nulla deviantibus poena sancitur*⁸, which neither rescinds the Act, nor punishes the Transgressor) has no Application here, if what the Modern Lawyers lay down be just, *viz.* that a Law with no Sanction at all, is *no Law at all*; it cannot subsist without it, and therefore, if not expressed must be supposed to be reserved to the arbitrary Pleasure of the Lawmaker⁹.

This is called the *Sanction* of a Law, which for very good Reasons, that have been collected by modern Writers upon the Subject, consists more properly in denouncing *Evil* to the Offender, than in throwing *Encouragements* before the Tractable and Obedient. In other Words, though I may be said to *guard* [*sancire*] my Commands, by any Expedient that will invigorate their Execution, yet that *kind of Sanction* has, by an universal Consent, obtained, which consists in *Commination*, rather than Allurements:

*Poena Metusque aberant, nec verba minacia fixo
Aere legebantur*¹.

————— *Dicant cur condita sit Lex
Bis sex in tabulis, aut cur Rubrica minetur,
Quae prohibet peccare reos*².

And this is the Reason why *Leges*, among other things (as the Walls and Gates of a City, the Persons of some of the Roman Magistrates, etc.) were called *Sanctae*, not from any supposed *Sanctity* (in our Notion of the word) inherent in them, but because they were *guarded* or *fenced*, round by this Civil Penalty. They come not under the Notion of *Res SACRAE* or *RELIGIOSAE*, but make a Head by themselves under the Title of *SANCTAE* or *Sancitae*.

⁵ D. 1. 3. 1.⁶ Brummer. ad L. Cinciam Cap. III.⁷ Vlpian. Tit. init.⁸ Macrobi. ad Somn. Scip.⁹ Pufend. I. 6.¹⁰ Burlamaqui I. 10, 11.¹ Ovid. I. Met. 91.² Prudent. II. adv. Symmach. 461.

Proprie dicimus Sancta, quae neque sacra, neque profana sunt, sed sanctione quadam confirmata: ut Leges sanctae sunt. Sanctione enim quadam sunt subnixae. Quod enim sanctione quadam subnixum est, id sanctum est, etsi Deo non sit consecratum³.

³ D. 1. 8. 9 3.

Sanctae quoque res, veluti muri, et portae Civitatis, quodammodo divini Juris sunt—Ideo autem muros sanctos dicimus, quia poena capitis constituta est in eos qui aliquid in muros deliquerint. Ideo et Legum eas partes, quibus poenas constituimus adversus eos qui contra Leges fecerint, Sanctiones vocamus⁴.

⁴ J. 2. I. 10.
Add. Macrob.
III. Saturn. 3.
Manut. Quae-
fit. p. Epist. II.
10. III. extr.

Popm. de Dif-
fer. verborum.

IV. pag. 153.

Reitz. de

Verb. Med. et

Ambig.

Holiday on

Juvenal. I. Sat.

110.

Ernst. ad Ne-

pot. in Attic.

C. 3.

Pitisc. Lexic.

V. RELIGIOSI.

SANCIRE.

SANCTIO.

⁵ In Cratyl.

⁶ Dion. Cassius

LIX. 28.

Sueton. in Ca-

lig. § 41.

⁷ III. Annal.

27.

XII.

I have some more Considerations to offer upon the Properties of Positive Law: but, as they are perhaps less interesting, or less striking than the former, I offer them here *per Saturam*.

That they ought to be *Public, Plain and Perspicuous*, is the Apprehension of every Capacity. As the Doctrine they convey is new in its own Nature, it would be ridiculous on the side of the Imposer, and grievous on the part of the Subject, to conceal it in any degree: if either the Declaration of it should be less notorious, or the Language less intelligible, than the Purpose seems to demand. I will not, with *Plato*⁵, expect the Grammarian in the Legislator, but must condemn such as drew up their Systems in Symbols and Hieroglyphics; lament the Revolution of Language, which in the Roman System, and some others I could mention, has given Occasion to numberless Volumes of Commentators; and as for that Exploit of *Caligula*⁶, who wrote his Laws so small, that they could not be read, and fixed them so high that they could not be seen, I want a Name to express my Conception of it.

That Laws ought to be *Few in Number*, has been the Sentiments of most Nations, but not the Happiness of many to experience. It was a hard saying of Tacitus, *Corruptissima Rep. plurimae Leges*⁷. But to the same Purpose is that of *Isocrates* before him:

Επεὶ τὰ γε πλήθη καὶ τὰς ἀκριβείας τῶν νόμων σημεῖον εἶναι τῆ κακῶς οἰκεῖσθαι τὴν πόλιν αὐτήν. ἐμφράγματα γὰρ αὐτὲς ποιούμενες τῶν ἀμαρτημάτων, πολλὰς γίνεσθαι τὰς νόμους ἀναγκάζουσαι. δεῖ δὲ τὰς εὖ πολίτευοι μὲν καὶ τὰς σοὰς ἐμπιπλάναι γραμμάτων, ἀλλ' ἐν ταῖς ψυχαῖς ἔχειν τὸ δίκαιον. οὐ γὰρ τοῖς ψηφίσμασιν, ἀλλὰ τοῖς ἡθεσι καλῶς οἰκεῖσθαι τὰς πόλεις⁸. *

⁸ Areopagit.
pag. 217. Ed.
Wolf. 1570.

* *Multitudinem autem et accuratiorem legum constitutionem, signum esse mali status Reip. Nam dum delicta quasi aggeribus obiectis coercere nitantur, necessario cumulari leges. Decere autem prudentes magistratus non porticus implere legibus, sed efficere ut Cives animis insitum habeant justitiae studium. Non enim SCta aut Plebiscita, sed praeclara instituta felicem efficere Civitatem.*

To the last Clause of this Sentence the Translator has not done Justice. It is what *Tully* means by his *SERENDI SVNT MORES*. A great Atchievement, but, as I have observed before, what Legislation is scarcely equal to.

I shall close this Reflection with a Passage of *Plato* ⁹:

⁹ Apud Strab.
l. 4 Geograph.

Παρ' οἷς πλεῖστοι νόμοι, ἔ δίκαι, παρὰ τέτοις ἔ εἰσι μοχθηροί. καθάπερ ἔ παρ' οἷς ἰατροί, πολλοὶ ἔ νόσους εὐκός εἶναι πολλὰς.*

I proceed to observe, that Human Laws are not designed to reach the Heart, but are confined to the *Overt-Act* only. Not that Law has no Feeling of the Profligate and Licentious Disposition, but if those Principles do not break out in some external Operation, the Efficacy of Law cannot possibly be exerted. And thus the Lawyers write:

Cogitationis poenam nemo patitur ¹.

¹ D. 48. 19.
18.

And so *Seneca*: *In quibusdam innocentes sumus, quia non successit* ².

² Senec. II.
de Ira. 28.
³ Id. ibid. I.

Innocentem quisque se dicit, respiciens testem, non conscientiam ³.

Quis tandem est nostrum, qui, quod ad sese adtinet, aequum censeat quinquam poenas dare ob eam rem, quod arguatur male facere voluisse?—Quae tandem Lex est tam acerba, quae dicat, Siquis illud facere VOLVERIT, mille nummi dimidium familiae multa esto: Siquis plus quingenta jugera habere VOLVERIT, tanta poena esto. etc. ⁴.

⁴ Gell. VII. 3.

And yet many things appear to contradict this Position. So *Servius* upon *Virgil*:

Ausi omnes immane nefas, ausoque potiti:

Dicit secundum Romanum ritum, in quo non tantum Exitus punitur, sed et Voluntas ⁵.

⁵ VI. Aen. 624.

Divus Hadrianus in haec verba rescriptit: In Maleficiis Voluntas spectatur, non Exitus ⁶.

Eadem enim severitate Voluntatem sceleris, qua Effectum, puniri jura voluerunt ⁷.

⁶ D. 48. 8. 14
See Grotii
Flor. Sparf.
pag. 238.
Gothofred. ad
C. 9. 16. 7.

Pari sorte Leges scelus punire, et sceleris voluntatem ⁸.

⁷ C. 9. 8. 5. pr.

But these, and several other, Instances mean an *Attempt*, though unattended with Success, when the Inclination is discovered by using the Means. That must be the Sense of *Voluntas* here, as *Gothofred* ⁹, and others have shewn, not the bare Conception or Imagination in the Mind. For how can a Law punish what it has no knowledge of? My Reader will observe I speak this only of human, instituted Law. The Crimes of the Imagination are before a Tribunal, but of another Sort.

⁸ l. 1 C. Theod.
ad l. Jul. de
Ambitu.
⁹ Ad D. 48. 19.
18.

As in the foregoing Consideration, the Law could punish the *Will* without the Deed, so it sometimes punishes the *Deed* without the Will.

* Apud quos plurimae sunt leges, apud hos etiam lites esse et malos mores: sicut morbi soleant esse multi, ubi multi sunt medici.

⁹ D. 1. 3. 1. *Papinian*⁹ *Delictorum quae sponte vel ignorantia contrahuntur. Demosthenes*¹. *Επανόρθωμα ἐκείων ἑ ἀνεπίων ἀμαρτημάτων*. How this is to be understood, especially when some Passages in the Law-Books seem to speak a quite contrary Sense², will be best learned, by consulting what has been said upon this Point by *Muretus*³, *Gothofred*⁴, *Cujacius*⁵, and *Neodt*.

⁵ pr. 39. 4. 16. 8. ³ Ad tit. de legg. etc. ⁴ Ibid. ⁵ XIX. Observ. 10. ⁶ Tom. II. pag. 12. Or briefly thus. Involuntariness is of two Sorts. If I am constrained to do an Act against my Will, through Necessity or any kind of Violence and a Mischief ensues, no Law can consider me as culpable in any degree. But that is said to be involuntary also, if an Act of mine, however intended, should terminate in a Mischief which I had no thoughts of producing. Here I may be considered as contributing to a Breach of Law (which in the former Case I could not, for I contributed nothing) and be punished *ob negligentiam* at least, or *ob culpam leviozem*.

⁷ D. 47. 21. 2. *Si per ignorantiam aut fortuito lapides furati sunt, sufficiet eos verberibus decidere*⁷.

*Qui aedes, acervumve frumenti juxta domum positum combusserit, vinctus, verberatus, igni necari jubetur, si modo sciens prudensque id commiserit. Si vero casu, id est, negligentia, aut noxiam sarcire jubetur, aut, si minus idoneus sit, levius castigatur*⁸.

⁸ D. 47. 9. 9. *In hac Actione, quae ex hoc capitulo oritur, dolus et culpa punitur. Ideoque si quis in stipulam suam vel spinam, comburendae ejus causa, ignem immiserit, et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit, requiramus num imperitia ejus aut negligentia id accidit: nam, si die ventoso id fecit, culpa reus est: nam et qui occasionem praestat, damnum fecisse videtur. In eodem crimine est et qui non observavit, ne ignis longius procederet. At si omnia quae oportuit, observavit, vel subita vis venti longius ignem produxit, caret culpa*⁹.

To understand these Laws aright, let these two things be noted; 1. That *Culpa*, with the Civilians, is either *Lata* or *Levis*; the former, when it approximates to *Dolus malus*, and has a Mixture of Design in it: the other when it has none. And 2dly, That *Culpa*, when it occurs alone, is always understood of the latter. It is proper to be acquainted with this Distinction: It is unnecessary to carry it farther with those, who distinguish *Culpa* into *Latissima*, *Latior*, *Lata*, *Levis* and *Levissima*.

It is upon the foregoing Principles, that most Civil Constitutions have provided a Punishment for Manslaughter and Chance-Medley: and upon these Principles also it is, that *Negligence*, or a Forbearance of an Act, is sometimes punishable like an actual Commission.

Impp. Severus et Antoninus Junio Rufino Praefecto Vigilum ita rescripserunt: Insularios, et eos qui negligenter ignes apud se haberint, potes fustibus vel flagellis caedi jubere: eos autem, qui dolo fecisse incendium convincentur, ad Fabium Cilonem, Praefectum Vrbi, amicum nostrum, remittes'.

¹ D. 1. 15. 4.

It is remarked, that the Ancients in the Case of *Caedes involuntaria*, underwent (generally) a kind of voluntary Banishment. Let us see how this Act is expressed.

Τοῖσι δ' ἐπ' Αἰκίδαι μελέκιάδον· οὐ μὲν αἶμ' ἄμφω,
Οὐδ' ὁμόθεν. νόσφιν γὰρ ἀλευάμφοι καίεναθεν
Αἰγίνης, ὅτε Φῶκον ἀδελφεὸν ἐξενάριξαν
ΑΦΡΑΔΙΗΙ· Τελαμῶν μὲν ἐν Ατθίδι νάσσατο νήσω,
Πηλεὺς δὲ Φθίῃ ἐνὶ δώματι ναῖε λιαθεῖς ². *
Εὐτέ με τυτθὸν εὐνία Μενoitι· ἐξ Οπóενι
Ηγαγεν ὑμέτερόνδ', ἀνδροκλασίης ὑπὸ λυγρῆς,
Ημαῖ τῷ, ὅτε παῖδα καίεκλανον Αμφιδάμανι·
ΝΗΠΙΟΣ, ΟΥΚ ΕΘΕΛΩΝ, ἀμφ' ἀσπραγάλοισι χολωθεῖς ³. †

² Apollon.
Rhod. 1. Argonaut. 90.

³ Homer. Iliad.
v. 85. Add.
D. 48. 19. 16.

This was the Case of *Adrastus* in *Herodotus* ⁴:

Ω βασιλεῦ, Γορδῖεω μὲν τοῦ Μίδεω εἰμι παῖς, ὀνομάζομαι δὲ Ἀδρησῶς.
φονεύσας δὲ ἀδελφεὸν ἐμεωῦ τοῦ ΑΕΚΩΝ πάρεμι, ἐξεληλαμένον τε ὑπὸ
τοῦ πατρὸς, καὶ ἐξερημένον πάντων. ||

⁴ I. 35.

The cause of the Quarrel between these two Brothers is mentioned by *Ptolemy Hephaestion* ⁵, and was much of the same Nature, as the last mentioned by *Homer*. ⁶ CXc.

Apud Graecos ex filio voluntario fortuiti casus luebantur ⁶.

⁶ D. 48. 19. 16.
8. Add. Grot.
Flor. Sparf.
pag. 230. Plutarch.
in Romul. pag. 49.
Edit. Bryan.
Tom. I.

It is not unlikely, but that the Athenians acted something upon this Principle, in that remarkable Instance of Judiciary Process, when they doomed to perpetual Banishment the Stone, or the Weapon, that had been the occasional Instrument of death ⁷.

⁷ See above.
p. 116.

I will close these Remarks upon the Property and Spirit of Positive Law, by observing in the last Place, that the best Constitutions the World has been acquainted with, have always paid a greater Attention to that *Legislation which regarded the Public or the State*, than that

* *Post hos vero Aeaci filii venerunt, non tamen simul uterque, Neque ex eodem loco. Scorsim enim declinantes habitaverunt Aegina, quando Phocum fratrem interfecissent Imprudentes. Telamo quidem in Attica Insula habitavit, Peleus vero in Phthia aedes separatim tenebat.*

† *Quando me tum parvulum Menoetius ex Opunte Duxit ad vestram Domum, homicidium propter triste, Die illo, quando filium infeci Amphidamantis Imprudens, invitus, de talis iratus.*

|| *O Rex, Midæ nepos, Gordii filius sum, nomine Adrastus: quia fratrem mei prius imprudens interemi, adsum ejectus a patre, et omnibus rebus exutus.*

which

⁷ Of Public Law, p. 61. See Isocrat. quoted p. 9.

⁸ Divinat. in Q. Caecil.

⁹ 20.

¹⁰ Il. c. Aristog. pag. 499. Ed. Cant.

which regarded Individuals. Of this something has been observed before? Cicero has a Passage to this Purpose:

Etenim si probabilis est eorum causa, qui injurias suas persequi volunt, qua in re dolori suo, non Reip. commodis serviunt; quanto illa causa honestior——⁸?

There is something applicable here, in an Oration of Demosthenes⁹:

Ωπερ γὰρ ἐν ταῖς ναυσὶν αἰμαρρημάτων, ἃ συμβαίνει περὶ τὰς πλῆθς, ὅταν μὲν τῶν ναυῶν τις αἰμάρρη βραχεῖαν τὴν βλάβην ἤνεγκεν, ὅταν δ' ὁ κυβερνήτης ἀποσφαλῇ, ἢ διαμάρρη, κοινῇ τὴν ἀτυχίαν ἅπασιν τοῖς συμπλέεσιν καίεσκεύασεν· ὡσαύτως τὰ μὲν τῶν ἰδιωτῶν αἰμαρρηματὰ ἐκ εἰς τὸ πλῆθος, εἰς δ' αὐτοὺς ἤνεγκε τὰς βλάβας, τὰ δὲ τῶν ἀρχόντων καὶ πολίτευομένων εἰς ἅπαντας ὑμᾶς ἀφικνεῖται, διὸ καὶ τὰς τιμωρίας ὁ Σόλων τοῖς μὲν ἰδιώταις βραδείας ἐποίησε, ταῖς δ' ἀρχαῖς, ἔτι τοῖς δημαγωγοῖς ταχείας· ὑπολαμβάνων, τοῖς μὲν ἐνδέχεσθαι καὶ παρὰ τὸν χρόνον τὸ δίκαιον λαβεῖν, τοῖς δ' οὐκ εἶναι περιμεῖναι τὸ ἐκδικούμενον. τὸ γὰρ τιμωρῶσθαι οὐχ ὑπέσαι, τῆς πολίτειας καὶ ἀλυθείας.*

It was a good saying of Plato, that the Happiest and most flourishing State was that, where there was the least mention made of *Meum* and *Tuum*¹, and the Reason was, because their Attention to the Public Interest would necessarily be the greater.

¹ Platarch. Nuptial. praecept. pag. 85. Edit. Gr. Basil. 1574.

Indeed private Property is by no means the ultimate and grand Intention of Law; though some Systematical Writers sit down to it at once, and fall on with great Keenness of Appetite. Estates in Land, and Divisions of Property (as We shall see below) the Interests of private Men, are only held of the Public by a kind of Tacit Agreement. The *Dominium Eminens*, the highest and most exact Idea of Property is in the Aggregate Body, who were seized first of these Estates in their collective Capacity; and therefore when the Public leased out these Lands to Individuals (as the Case may not improperly be stated or imagined) there was always a Reservation of the Public Interest, a saving of Rights to the original occupants, in Case their Necessities called for them back again. A Title possibly, that all our *Conveyancers* are not acquainted with.

* *Vt enim delictorum, quae in navibus committuntur inter navigandum, si quis nautarum deliquerit, parvum est damnum, sin gubernator deceptus fuerit, aut aberrarit, communi calamitate vectores omnes involvit: sic et plebeiorum peccata non in populi, sed in ipsorum damnum cedunt, sed et magistratum et remp. gubernantium peccata ad vos universos pertinent. quapropter et solo plebeiis tarda, magistratibus et populi gubernatoribus velocia supplicia constituit: quod existimabat, de illis quovis tempore sumi posse poenas, hos moram ultionis non admittere, oppressa enim libertate, qui poenas repetat, fore neminem.*

LEX

In a Roman Sense,

OR

POPVLISCITVM.

The *Leges Romanae* have been collected, and illustrated, by

Paul. Manutius. Colon. 1552. 8.

Vdalric. Zasius, et Ludov. Charondas. Par. 1554. 8.

Ant. Augustinus, et Fulv. Vrsinus. Rom. 1584. 4.

Val. Forsterus. Hist. J. C.

Hotoman.

Rosinus.

} *Antiqq. Rom.*

Job. Calvin. Lexicon. Juridic. ad calcem.

P. Merula, inter Opera Varia Posth. Lugd. Bat. 1685. 4.

Pitiscus in Lexic. Antiqq. Rom.

Olivet. in Edit. Ciceronis. Tom. IV.

TO consider more particularly the Law of the Romans; The several Species, which constitute the *Jus Romanum*, are thus enumerated;

Lex,

Plebiscitum,

Senatus Consultum,

Responsa Prudentum,

Jus Praetorium, or Honorarium,

Constitutio Principis,

And lastly, Unwritten Law, or

*Consuetudo*¹.

The Six Species of Written Law are expressed thus in the Greek Writers upon this Subject²:

Εξ παρὰ Ρωμαίοις Νομοθέται. Δῆμοι. Χυδαῖοι Δῆμοι. Σύγκλητοι.
Βασιλεὺς. Ἀρχοντες τῆς Ρώμης. Σοφοί.

Z

With

¹ J. 1. 2. 3.

D. 1. 1. 7.

1. 2. 2. 12.

4. 6. 1. 1. fin.

² Theophilus.

σχ. Basilic.

ad Lib. LX.

Tit. 3.

With Cicero, the Recital stands in this manner :

³ Topic. 5.

*Id quod in Legibus, SCtis, Rebus Judicatis, Jurisperitorum Auctoritate, Edictis Magistratum, More, Aequitate consistit*³.

Here the Difference is not very material : something more in this Passage, which follows from the same Author,

Constat [Jus] ex his partibus, Natura, Lege, Consuetudine, Judicato, Aequo et Bono, Pacto. Natura Jus est, quod Cognationis aut Pietatis causa observatur. — Lege Jus est, quod Populi jussu sancitum est. — Consuetudine, — quod sine Lege, aequae ac si legitimum sit, usitatum est. — Judicatum est id, de quo Sententia lata est, aut Decretum interpositum. — Ex Aequo et Bono Jus constat, quod ad veritatem et utilitatem communem videtur pertinere. — Ex Pacto Jus est, Si qui inter se pepigerunt, siquid inter quos convenit.

⁴ II. ad Heren.

¹³.

A fair Account of the several Sorts of Roman Law, will give us a competent View of the Roman Constitution.

LEX is, *Quod Populus Romanus, Senatorio Magistratu interrogante, constituit* : PLEBISCITVM, *quod Plebs, Plebeio Magistratu*⁵.

² J. 1. 2. 4.

The three essential Differences between *Lex* and *Plebiscitum* are, 1. The Enacting Parties, *Populus* on the one hand, and *Plebs* on the other. 2. The Legislator, or Person proposing ; a Member of Senate in that Instance, and a Tribune in this. And 3. (what is not expressed above) the Difference of the *Comitia*, or *Assembly* in either Case.

Of each of these in their Order.

I.

POPVLVS ROMANVS — PLEBS.

⁶ Fest. v. ROGATIO.

⁷ Boeth. III. in Cicer. Topic.

⁸ Liv. XLV.

²⁵.

⁹ Tacit. III.

Annal. 58.

*Quod in omnes homines resve Populus scivit, LEX appellatur*⁶.

*LEX est, quam Populus Centuriatis Comitiis sciverit*⁷.

Lex is therefore equivalent to *Populiscitum* :

*Ut nullum de ea re Scitum Populi feret*⁸.

*Nulla de eo Populi Scita, non in libris Cerimoniarum reperiri*⁹.

Scitum Populi dicebatur, quod sine Plebe cunctus Patricius Ordo, rogante Patricio, suis suffragiis jussit. Quod autem aliquo interrogante ex Patribus, et Plebe suffragante, scitum esset, id jam Leges scriptae dicebantur. Sed illud Plebiscitum est, quod Tribunus Plebis, sine Patriciis plebem rogavit, id est, consuluit, Plebsque scivit. So Festus.

But I again caution my Reader against that Author — and his Copies.

Carnelius

Cornelius Nepos uses this Expression frequently for a Vote or Decree of the People of Athens:

Post suffragante Theramene, Populiscito restituitur ¹.

The People of Rome, taken collectively, was called POPVLVS. From which PLEBS differed, as *Species a Genere*, says *Justinian* ², rather as *Pars a Toto*.

¹ VII. 5. 4.
Add.

III. 1. 5.

XV. 7. 4.

XIX. 2. 2.

² J. 1. 2. 4.

Every Roman was by birth either a *Patrician* or a *Plebeian*. The Former are generally supposed to descend from the better Class of Citizens, at the first Establishment of the Constitution; the Sons and Lineage of those whom *Romulus* called to his Council, and whom He named *Patres*, either *ab Aetate*, or *ab Auctoritate*. The Descendants of the Rest, the *Plebei*, were, for some time, a low and contemptible Race, excluded from all Honours, and several Privileges and Emoluments, till *Valerius*, the Colleague of *Brutus*, and one of the first Consuls, raised them to some Degree of Credit and Reputation; from whence He got the name of *Publicola*. From that time their Intrigues and Dissentions with the *Patrician* Families, occasioned frequent and great Revolutions in that Republic. They came, by degrees, to share in most Parts of the Administration, but still continued a different Class of People, with different Rights and Distinction of Character. So that the best way of conceiving this Division would be, to consider the *Patricians* and *Plebeians* as two Factions in the State, blended indeed very frequently in regard to Honours, Rank, and Condition, but still separated by Descent and Family Interests. For Instance: the Distribution of the Romans into *Senatores*, *Equites*, and *Plebem*, was not a Distribution of Species or Sort, but of Rank, Order, or Degree. It is a Verse of *Ausonius*, I think:

Martia Roma triplex, Equitatu, Plebe, Senatu.

Where *Plebeians* are not such as lately were *opposed* to *Patricians* (for the *Equites* were *Patricians* or *Plebeians* indifferently, and so were the *Senators*) but those whose *Census* or Estate was below the *Census* required for *Equites*.

*Si quadringentis sex septem millia desint,
Plebs eris* ³.

³ Hor. r.
Epist. 1. 58.

So again, when the Romans were divided into *Nobiles* and *Novi*, this is also a Distinction of Rank, not *Nativity*, and affects not the Distinction of *Patricians* and *Plebeians*. *Nobiles* were such, whose Ancestors had born particular Offices whether they were *Patricians* or *Plebeians*. So that many *Plebeians* were *Nobiles*, and many *Patricians* not so.

This Distinction of the Roman People into *Patricians* and *Plebeians* has been well considered by *Dionysius Halic.* ⁴, and their separate Rights fairly represented. Among the Moderns, the Writers of Law and of Anti-
quities

⁴ II. 8. Add.
Gell. X. 20.
Ibid. IX. 4.

³ Augustin. de Legg. c. 3. et 7. quities have been engaged in it also³; but some have been so far bewildered in their Searches, as to be reduced to admit of *Plebeian Patricians*, and many other such Absurdities.

⁴ P. Servius Mil. cell. c. 2. et 3. As for Instance,
Gothofred. ad D. 50. 16. 238.
Vinn. ad § 4. Inst. de J. N. G. et C. n. 4. Rosinus.

As for Instance,

Cives Romani Patricii, et Plebei, Senatores.

Cives Romani Patricii, et Plebei, Equites.

*Cives Romani Patricii, et Plebei, De Plebe*⁶.

Dempster.

Lipfius.

Gravina, etc. etc.

⁶ Rosin. I. Antiqq. Rom. Gravina, etc.

⁷ Praef. Thef. Antiqq. Rom. T. I.

The Person who has considered this best, and rectified the Errors of the rest, is *Graevius*⁷. However it must be admitted upon the whole, in Tendernefs to those People I mentioned, that when *Plebs* is opposed to Senators and Equites, as in the two late Instances, it is not *Plebs* in the same Sense as We have been all along considering, but approaches near what We mean by the word *Plebeian* in our own Language.

If it be asked, whether this Distinction of *Populus* and *Plebs* be uniformly maintained, I answer: that neither in this, nor in any other Instance, were the Romans such Slaves to Language, as not to depart from some settled Rules upon many Occasions. Thus *Populus* (properly the whole People of Rome universally) is yet, in the following Instance, opposed to *Plebs*, or a Part itself:

⁸ Cic. X. Fam. 35.

LEPIDVS IMP. ITER. PONT. MAX. SENAT. POP. PL. Q. R. S. D.⁸

And on the contrary, *Populus* sometimes stands for *Plebs*, as distinguished from the other Division of the Roman People:

⁹ Hor. 2. Sat. I. 69.

*Primores Populi arripuit, Populumque Tributim*⁹.

To proceed. This is the first Instance wherein *LEX*, or that kind of Constitution which bound the whole Roman Common-Wealth universally, differed from *Plebiscitum*.

II.

The second Difference was the Officer, who made the Proposal. It was a Magistrate who proposed the *Lex*: the *Plebiscitum*, a Tribune only. And as Magistracies and Offices among the Romans were pretty numerous, be it remembered, that it was one of the *Magistratus Majores*, or the Magistrates of a higher Order only, such namely, *penes quos erant majora Reip. Auspicia*.

These were either ORDINARY, as *Consul, Praetor, Censor*, or EXTRAORDINARY, as *Interrex, Dictator, Decemviri Legibus scribendis, Trib. Mil. Cos. Pot. Triumviri R. P. C.*

It is not to be doubted, but that the *Magistratus extra ordinem dati*, who were necessarily vested with Supreme Authority, had the same Power as the Consul, etc. Of which the *Leges Decemvirales* are an Instance. The other follow:

Laws

Laws proposed by Dictators:

*Lex Aemilia de Censura*¹,
Glicia de Inofficioso Testamento,
Hortensia de Plebiscitis,

¹ Liv. IV. 24.
 IX. 33.
 Pitisc. Lexic.
 Antiqq. Rom.
 V. CENSOR.

And the many Cornelian Laws of Sylla, as the *Lex Cornelia, De Proscriptione*,—*De Sicariis*,—*De Provinciarum Reſtoribus*,—*Sumptuaria*,—*De Repetundis*, etc.

By Military tribunes with Consular Authority:

*Lex [Pinaria] de Ambitu*²,
*Cornelia de Patriciis*³.

² Liv. IV. 25.
³ Liv. VI. 20.
 Hotoman.
 Antiqq. Rom.
 I. 1.
⁴ Appian. III.
 B. Civ.

By M. Anthony, in his *Triumvirate*, this among others:

*Lex Antonia de Dictatura*⁴.

The *Interreges* indeed had not this Power. For though they had a Right to assemble the People, and hold the *Comitia Centuriata*, They could do it for no other Purpose, than the Creation of new Officers. It appears from *Tully*⁵, that They had no Jurisdiction whatever, and that during their Continuance, there was a perfect *Iustitium*, or a Stop put to all public Buſineſs. Hotoman therefore muſt be miſtaken, when He maintains, that the *Interrex* could propoſe a Law⁶. And yet there looks something like it in this Paſſage of *Tully*:

*Omnium Legum iniquiſſimam, diſſimillimamque Legis eſſe arbitror, quam L. Flaccus interrex de Sulla tulit, ut omnia, quaecunque ille feciſſet, eſſent rata*⁷.

⁵ VII. Fam. 11.
⁶ Antiqq. Rom.
 I. 1.
⁷ III. in Rull. 21.
 Add. I. de
 Legg. 15.
 A. Auguſtin.
 de Lege Valeria.
 Gruch. de
 Com. Rom.
 I. 3.

Of the Ordinary Magiſtrates, the CONSVL was generally the Propoſer. Hence ſo many Laws called by his Name, and ſometimes by both their Names, as

Lex Aurelia,
Petronia,
Aemilia.

Lex Junia—Norbana,
Papia—Poppaea,
Aelia—Sentia,
Fuſia—Caninia.

And it is no Queſtion, but that the PRAETORS had the ſame Power; of which We have Inſtances,

Lex Aurelia de Judicibus, a L. Aurelio Cotta Praetore.

Lex

L E X, or

Lex Caecilia de Jure Italiae, a Q. Caecilio Metello Nepote.

*Lex Cassia,
Fufia,
Licina.*

It is therefore not strictly true, that Laws double-named only, were Consular, and all single-named, Praetorian

Nor is it true, that this was one Distinction between *Lex* and *Plebis- citum*, viz. That the latter was called by one Name, and the former by

* Paul. Merula
de LL. Rom.
C. 24.

two⁷. Of the CENSORS with some it is a Doubt: with me it is no Question at all. They had not this Right in any Degree, though many Passages look like it, where mention is made of the *Leges Censoriae*. So this also:

*Neque pigebit banc quoque partem attingere, cum Lex Metella exstet
Fullonibus dicta, quam C. Flaminius, L. Aemilius Censores dedere
ad Populum ferendam*⁸.

* Plin. XXXV.
17. Add.
Harduin. ad
loc.

A. Augustin.
de LL.

Hotoman.
Antiqq. Rom.

Manut. de
LL. C. 18.

Pigh. Annal.
Rom. II. p.

337.
XV. 11.

* Gundlingia-
na XVI. Ob-
ser. 1. § XXVI.
pag. 61.

Now, in relation to this Passage, it is plain, that This was *not* proposed by these Censors, for it bears neither of their Names. *Caecilius Metellus* was *Trib. Pl. A.* 533. And it is supposed to be a *Plebis- citum* belonging to Him.

It is plain also, that these Censors did not *ferre* or *rogare banc Legem*, because they gave it, *ferendam dedere*, or contrived it to be proposed by another.

When therefore We read of *Leges Censoriae*, We must understand their Edicts or Proclamations, relative to their Office. These *Gellius*⁹ calls *Leges Censoriae*, which has contributed to the Mistake¹. A considerable Part of the Censors' Office was concerned in leasing out the City Revenues to those who were willing to farm them; but more particularly in the Inspection of the public Repairs. For which Reason, when they issued out their Precepts *de Sartis Teetis exigendis*, or Writs of Inquiry, upon whom, or upon whose Estates, the *Onus reficiendi* lay, those Precepts had the name of *Leges*, which indeed were only Formularies, or Rules of Court; and were sometimes enlarged by succeeding Censors: *Addiderunt*, as *Tully* writes in a Passage to be produced immediately.

An Instance of what I have been laying down, is seen in the *Verrinae* of *Tully*. During the Vacancy of the Censorial Office, (as it was sometimes discontinued) this Part of the Administration devolved upon the Praetor *Urbanus*, as here upon *Verres*, whose *Precept, Injunction* or *Order* [*Lex*] is preserved in one of those Orations.

*Operae pretium est ipsam Legem cognoscere. Dicetis eundem conscrip-
pisse, qui illud Edictum de hereditate. LEX OPERI FACIENDO
PVPILLI IVNII. Quae? Dic, dic, quaeſo, clarius. C. VERRES*

PR.

PR. VRBIS ADDIDIT. *Corriguntur Leges Censoriae. Quid enim? Video in multis veteribus, Cn. Domitius, L. Metellus, L. Cassius, Cn. Servilius Censores addiderunt. Vult aliquid ejusmodi C. Verres. dic. Quid addidit?*

² III. Verrin.
55.

As this Passage is admirably restored by *A. Augustinus*.

So that what was *Edictum* in *Verres'* Praetorial Capacity, was *Lex* in his Censorial.

*Prodit, porro dederit, ut est in Lege Censoria: PORTICVM SAR-TAM TECTAMQVE HABETO PRODITO*³.

³ Festus.

*Nesi pro Sine positum est in Lege Dedicationis Arae Dianae Aventi-nensis*⁴.

⁴ Idem.

The *Leges Aedium Sacrarum* are mentioned by the same Author, and others⁵.

⁵ See Scalig-
ad Fest. v.
MIGRARE-
OPIMA.

Were We therefore to attribute to these *Leges Censoriae* as much Legal Authority, as we do to the Praetors' Edicts, they would not even then be *Leges* in the Sense We are concerned about: πολλὰ γὰρ ἐστὶν. And much the same I have to observe of the *Edicts of the Aediles*. But, that I may not interrupt the Process We are upon, I shall consider them in a Place which may be as proper also for their Consideration.

III.

The third Difference between *Lex* and *Plebiscitum* though not commonly expressed in the Definitions of them, is the Difference of that Court or Assembly, at which each of these were enacted.

The Assemblies or	} {	<i>Curiata,</i>
<i>Comitia</i> of the		<i>Centuriata,</i> or
Romans were		<i>Tributa.</i>

In the two former were the *Leges* enacted, in the latter the *Plebiscita*.

COMITIA CVRIATA.

It is sufficient to understand in general, that *Romulus* divided his People into Three Tribes, and each Tribe into Ten *Curiae*⁶. During the Reign of the five first Kings, the *Comitia Curiata* were the only Assemblies of the R. P. Here they chose Magistrates, enacted Laws, determined upon Peace and War etc.

⁶ D. I. 2. 2. 2.
Dionys Halic.
II. 7.
Liv. I. 13.
Festus, v. CV-
RIAE.
Hotoman. IV.
Observ. 33.
II. Antiqq. 3.
et 12.

COMITIA CENTVRIATA.

Under the former Distribution, the Vote of the meanest Man in Rome was as effective as that of the best. *Servius* the sixth King, desirous to throw the Ballance into the Scale of the more valuable Part of the People, cajoled the lower Sort, by telling them, that, to ease their Burden of being taxed to the Exigencies of the Public in the same Proportion with the

Sigonius de
Antiquo Jure
Civ. Rom. II.
3.
Gravin. O-
rigg. J. C.

the Rich, He desired them to bring in a true State of their Condition, Family, Age, *etc.* upon Oath. Having got this Knowledge of his Subjects, (who were now about eighty thousand Citizens, able to bear Arms) He distributes them afresh, according to their Substance and Condition.

*Descriptus Populus Censu, Ordinibus, Aetatibus, plus adhibet ad suffragium consilii, quam fuisse in Tribus convocatus*⁶.

⁶ Cic. III. de Legg. 19.

He divides them therefore into Six Classes, which consisted of one hundred ninety three Centuries.

C L A S S I.

Consisted only of Senators, Patricians, and Men distinguished by their Worth and Riches. In this Class were

Centuries of	{ Horse — — — XVIII. }	} In all XCVIII.
	{ Foot { XL. Sen. above 45. } LXXX. }	
	{ XL. Jun. 17—45. }	

*Seniores, ad Urbis custodiam ut praesto essent: Juvenes, ut foris bella gererent*⁷.

⁷ Liv. I. 43.

C L A S S II.

Consisted of the next lower *Census* in Rank and Fortunes.

Centuries	{ X. Seniorum. }	} — — — XXII.
	{ X. Juniorum. }	
	{ II. Fabrūm. }	

C L A S S III.

Centuries of Foot	— — — —	XX.
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C L A S S IV.

Centuries of	{ Foot } XX. }	} — — — XXII.
	{ Trumpeters. } II. }	

C L A S S V.

Centuries of Irregulars	— — — —	XXX.
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C L A S S VI.

Century of the poorest and lowest of the People	—	I.
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Total CXCIII.

These last were called *Proletarii*, or *Capite Censi*. The former, because their only use in the State was to increase the number of Subjects: the other, because they had no Estate (at least their Fortunes were under Par) to be registered by, but their names and numbers only⁸.

In

⁸ Liv. ibid.
Dionys. Halic.
IV. 16—20.
VII. 59.
Gell. XX. 1.
Rofin. VI.
Antiqq. 8—14.
Sigonius de
Antiquo Jure
C. R. I. 4.
P. Merula de
Comitiis, c. 2.
Pet. Nannius
IX. Miscell.
12. X. 6.
Gruchius de
Comitiis, I. 1.
Vinn. ad § 1.
Inst. de Te-
stam. Ordin.
Gravina O-
rigg. J. C. I.
11.

In both Assemblies, whether *Curiate* or *Centuriate*, the Question was not carried by a Majority of single Voices, but by a Majority of *Curiae*, or *Centuries*.

Ο,τι ταῖς πλείοσι δόξειε φραξίαις, τῆτο ἐπὶ τὴν Βουλὴν ἀνεφέρετο.*

* Dion. Halic.

II. 14.

(The Senate was composed of a Few, and those of the better Sort, at first only One Hundred. The *Comitia* was the popular Assembly of all the Roman Citizens universally.)

I judged it proper, that my Reader should snatch, in a short and comprehensive View, this Part of the Roman Constitution. He will more easily make himself Master of Particulars, even when they contradict, or vary from, his general System: and I am persuaded, that many things might be taught more successfully, if both Writers and Readers would sometimes consider that which they set off with, not as a Part of the Building, but only as so much Scaffolding, to be laid aside afterwards, or thrown by, as useless and unnecessary. In the Civil History of a People, this Doctrine may have fairer play, because the Constitution of a Country, at its final Settlement, is best apprehended by the Difference it carries with it, from the same Constitution, when it first began to be moulded. I descend therefore from Generals, and come to consider minutely the Matter of *Tribes*, of *Curiae*, and of *Centuries*.

The three Tribes, into which I observed *Romulus* had divided the original People of Rome, were either *Rhamnenses*, such as came with him from Alba: *Tatianses*, such as came in, under *Tatius* the King of the Sabines: or, lastly *Luceres*, possibly that Multitude, that flocked in from all Quarters, upon *Romulus*' Invitation.

* Dion. Halic.

II. 7.

Liv. I. 13.

X. 6.

Sigon. de An-

tiqu. Jur. Civ.

Rom. I. 3.

Varro de L.L.

IV. 9.

IV. 14.

But this Division of the Romans into *Tribus* Γενικαῖς, as *Dionysius Halic*³ calls them, (for it regarded the Original, the Stock, the Descent of the Constituents) did not prevail long: There ensued under *Servius* another, which was a *Local* Distribution, and which the same Author accordingly calls Τοπικὴν. He divided, for instance, the City into four *Wards*, or *Regions*, which He called Tribes also: *Suburana*, *Esquilina*, *Collina*, *Palatina*; and denominated his People thus digested, not from the Race they sprang from anciently, but the Place they inhabited now. And this was also a more equal Division. For the *Luceres*, besides being the more numerous, were daily increasing by a Conflux of adventitious People, when the other were not.

The Division of the Romans into *Tribes* and *Curiae* resembles much the Athenian Distribution into ΦΥΛΑΙ, or Tribes; which were again made up of several distinct Fraternities, called by them ΦΠΑΤΡΙΑΙ⁴.

* Appian. B.

Civ. III. p. m.

586.

* Quodcunque pluribus Curiis placuisset, id ad Senatum referebatur.

³ II. 7, 8. Add
Plutarch in
Theseo.

Rosin. I. An-
tiq. Rom. 15.

⁴ II. 8.

(And in the same manner was the Roman Division into Patricians and Plebeians planned upon the Model of the same People, according to *Dionys.*

Halic. ³, if that Passage ⁴ beginning with ἐκ τῆς Ἀθηναίων πολιτείας — and ending in προσεληφθησαν ἐπὶ τὰς αἰχὰς, can be admitted to be his).

I would have it noted, that the Subdivision of the Athenian Tribes was two-fold, the one a Civil and Political one, namely Δῆμοι: whereas the Other of Φρατρίαι partakes more of a Religious Nature; as there was a Temple, a Place of Worship (Φράτριον) and also Rites and Sacrifices appropriated to each Fraternity. And many other Particulars speak the same, as those Writers will shew, who have collected upon this Subject. By what We can guess at this Distance, the Former (Δῆμοι) might resemble the Wards of a City in a local consideration: the Latter a Separation into Parishes, or perhaps, Companies or Fraternities, distinct in Place and Habitation, but united in one common Interest.

The Roman Disposition was much of the same nature, but more simple: where the Distribution into *Curiae* seems to answer both the Purposes last mentioned. For *Curia* expresses both:

⁵ Var. de L. L.
V. 6.

⁶ Id. IV. 32.

Curia, ubi Senatus Remp. curat: Illa etiam Curia dicitur ubi Cura Sacrorum publica ⁵.

Curiae duorum generum. Nam et ubi curarent Sacerdotes divinas, ut Curiae Veteres, et ubi Senatus humanas, ut Curia Hostilia ⁶.

Curia Locus est, ubi publicas Curas gerebant — Curiae etiam nominantur, in quibus uniuscujusque partis P. R. quid geritur. Quales sunt eae, in quas Populum Romulus distribuit, numero XXX. — ita ut in sua quisque Curia sacra publica faceret, feriasque observaret ⁷.

⁷ Festus in v.

And, in conformity to this, *Curia* was the common Place of Worship for those of this Connection: the Officiating-Minister was called *Curio*: and lastly, over the whole Body of these Priests, or *Curiones*, presided a

⁸ Liv. XXVII. *Curio Maximus* ⁸.

s.

The word *Curia* therefore (from whence, with great reason, is supposed to proceed the French word *Curé*, and our English, *Curate*, which formerly expressed the Incumbent or Rector of a Parish) is very often taken in a Religious Use only. So the Body or College of Priests, or *Salii*, was called *Curia Saliorum*. These Considerations may be of use to Us, when We are asked, what became of the *Comitia Curiata*, after the Institution of the *Centuriata*, namely, when the Votes of the People came to be collected, not by Fraternities, or Companies, but by a new Distribution of the same People, according to their Rank, Consequence and Substance: and How We must reconcile, what We intimated formerly of their being laid by, upon this new Scheme of Constitution, with the mention that is made of them by Authors, down the Age of the Republic, and afterwards. I have no Design of entering into the large Field

of

of Controversy, which this Subject has opened to two very considerable Writers. I answer, in general: They were still retained, as We say, *Dicis Causa*, or for Form-sake, possibly, *quod in iis major esset Sacrorum auctoritas*. So Cicero^o,

^o II. Agrar.

Prima illa Comitia tenetis Centuriata, et Tributa: Curiata tantum auspiciorum causa remanserunt. § 11.

The Conclusions of the *Comitia Centuriata* were still ratified here in shew, this being the older and more constitutional Assembly of the two.

And it was easily conducted: thirty Lictors, or public Officers, representing the thirty *Curiae*. And so Cicero seems to distinguish between the *vera Comitia Curiata*, and those *ad speciem, atque ad usurpationem Vetustatis, per triginta Lictores auspiciorum causa adumbrata*.

¹ Id. ibid. § 12.

And this might lead some People to imagine, that *Curia* had its name not from that Reason or Etymology, Which We have seen above, but owes its Origin to the *Κυρία* of the Greeks, because that People distinguished their Assemblies into *Statutable*, (as I may call them, or such as returned upon set Days periodically, *Κυρία Εκκλησία*) and *Extraordinary*², the Former of which only were such, as did *κυρῶν*, or pass the Bills proposed, into Legal Conclusions.

² Not. ad Dionys. Halic. II. 7.

It must not be forgot moreover, that, in Process of Time, the Number of the Tribes grew up from Four to Five and Thirty (the first being called *Urbanae*, the additional ones *Rusticae*) without a correspondent Enlargement of the *Curiae*. So that there was not a Roman, who did not belong to some Tribe, and some Century, but not necessarily to some one of the *Curiae*. The Religious Interests therefore of these Country Tribes, who had no *Curiae*, seem to be provided for by *Servius* (who first encreased the Number of Tribes) by the Institution of several Rites at a Place of Strength, which was likewise to be the common Place of Resort for every Tribe. This Place was called *Pagus*, and the Sacrifices performed there *Paganalia*, in contradistinction to those in the City, which were called *Compitalia*. Here He likewise planted a Civil Officer for the Receipt of their Contributions, the Inspection of their Numbers, and the Regulation of their Discipline. Much more to this Purpose may be gathered from the Accounts which *Dionys. Halic.* has left us³ of this politic Prince, who appears to have been a very able Master in that Science, as far as the History of those Times may be credited.

³ Lib. 4.

For some time the Tribes, with their *Curiae*, comprehended the People of Rome in one manner of Distribution, and the Six Classes, with their *Centuries*, in another, without any Mixture or Relation: but, as *Sigonius* gathers from *Livy*, afterwards these two Distributions were united, or blended together. Which may be thus comprehended, *viz.* by conceiving the Roman People distributed (as they were) into XXXV. Tribes, each Tribe into Six Classes, and every Class into the appointed Number of

Centuries. Every Class, which before took in all the People of Rome, of that Lot or distinction, was now broke into XXXV. Shares, according to the Number of Tribes.

My Reader moreover will not be surprized, if I should call *Five* Classes, what I lately considered as *Six*; when He reflects, that the last or lowest had no Attention given them whatever, as being made up of the Dregs of the People. So that when *Tubero* writes³, that *Servius Tullius* instituted *quinque Classes*, He is taken by all in this Sense: and *Livy*⁴, at the first Creation of Ten Tribunes, informs us, that they were *chose, bini ex singulis Classibus*.

He will also remember, that though there were Five (or Six) Classes, yet *non omnes qui in Classibus erant, Classici dicebantur*, but those of the first Class only, and all the rest were said to be *infra Classem*⁵. It is from this last Consideration, that *Festus*⁶ calls the Subscribing Witnesses to a Will, if they were People of the first Rank, *Classici Testes*; and hence also the Writers of the best Age and Authority, are called *Classic Authors*, according to the same *Gellius*⁷.

This Subject has been well handled, by *Sigonius* and *Gruchius* particularly: who with other Writers, useful to be consulted upon the Subject, are to be met with in the first Volume of *Graevius' Thesaurus Antiquitatum Romanarum*.

I have said nothing in relation to the *Comitia Calata*, which did not constitute another Species of *Comitia*, distinct from what We have seen⁸; nor of the *Comitia Tributa*, which I shall have a fairer Opportunity of speaking to, when I come to consider the *Plebiscitum* in the following Section.

³ This treated upon more largely, Manut. de LL. Rosinus VIII. 2.

⁴ Gravina Origg. J. C. Hottoman. II. Antiqq. Rom. 11.

⁵ Vinnius ad § 3. J. de J. N. G. et C.

⁶ Stryk. Praecogn. Jur. C. 1. § 18. Heineccius A. R. 1. 2.

⁷ Cic. pro Domo, § 16. Manut. de LL.

⁸ Festus Vid. Voss. Etymolog.

It may be useful also to take a short Review of the manner of passing Laws at Rome, by which some Light will be thrown, if not upon Civil Law, at least upon Antiquity⁹.

The Person, who had a Law to propose, first wrote it over at home, and shewed it his Friends, before He proposed it, that there might be nothing in it contrary to the Form and necessary Ingredients of such a Proposal.

Next followed a Proclamation appointing a Day to meet upon. There was always a necessary Interval of *Tres Nundinae*, of twenty seven Days between this Proclamation, and the Day of the Assembly: that the *Tribus Rusticae* which came to Rome to market, might be acquainted with the Contents of the Law¹. And this was called *Promulgatio*, which some apprehend to be *qu. Provulgatio*.

*Promulgari Leges dicuntur, cum primum in vulgus eduntur, quasi provulgari*².

For the Law was exhibited in public, that every individual Citizen might inform himself of the Subject and Propriety of it.

It

It was not lawful to hold this Court upon the very Day of the *Nundinae*, but it was held, commonly, upon the Day after ¹. For the *Nundinae* were *Dies Nefasti*: ³ Macrob. I. Saturn. 16.

*Ille Nefastus erit, per quem tria verba silentur;
Fastus erit, per quem lege licebit agi* ⁴.

⁴ Ovid. I. Fast. 47.

And that for this Reason:

Nundinas Feriarum diem esse voluerunt Antiqui, ut Rustici convenirent mercandi vendendique causa, eumque Nefastum: ne, si liceret cum Populo agi, interpellarentur Nundinatores ⁵.

⁵ Festus in v. Add. Macrob. I. Saturn. 16.

And let it be observed, that the same Number of Days was observed in summoning those *Comitia* which were held for the Election of Magistrates: that the Candidates might have time, to apply, and the People, to form their Judgments:

Decemviris creandis in Trinundinum Comitia indicta sunt ⁶.

⁶ Liv. III. 35.

Ad Consulatus petitionem se venturum, neque se jam velle, Absente se, rationem haberi Sui, se praesentem Trinundinum petiturum ⁷.

⁷ Cic. XVI. Fam. 12.

The same Rule was observed in all Causes that were heard by the People:

Cum tam moderata Judicia Populi sint a Majoribus constituta: primum, ut ne poena Capitis cum pecunia conjungatur, deinde, ne nisi praedicta die quis accusetur, tertio, ut ante Magistratus accuset, intermissa die, quam multam irroget, aut judicet: quarto, sit Accusatio Trinundinum ⁸.

⁸ Id. pro Domo 17.

It was a rare Instance, when these Formalities werenot all preserved. However we meet with One:

Lex Didia-Licina—*cujus ferundae probandaeque tantum studium ab Optimatibus impensum est, ut Consulto Senatus juberetur, ut ea tantummodo promulgata, priusquam trinundino confirmaretur, ita ab omnibus observaretur, quasi jam populi sententia comprobata* ⁹.

⁹ Macrob. II. Saturn. 13.

If the Proposer was of the *Magistratus Majores*, He commonly laid it before the Senate for their Approbation: The Tribunes laid their *Plébiscita* before the People, without consulting the Senate.

When they were assembled, a Cryer proclaimed the Law after a Clerk, that read it to him.

Then the Proposal was supported or opposed, either by the Magistrates, who had this Right inherent in their Office, or by private People, who had first obtained this Leave from the Magistrate ¹.

¹ Liv. XLV.

Rem populum docento: Doceri a Magistratibus Privatisque patiuntor ².

² Cic. III. de Legg. 4.

If any private Man spoke, it was done before the Magistrate spoke, that the latter might have no Influence in swaying the former.

This

This was called *Legem Suadere*, or *Diffuadere*:

Ita traditum erat, ne quis prius intercederet Legi, quam Privatis Suadendi, Diffuadendique legem Potestas facta esset; eoque persaepe evenisset, ut, qui, non professi essent se intercessuros animadversis vitiis legis ex ratione diffuadentium intercederent: et, qui ad intercedendum venissent, desisterent, victi auctoritatibus suadentium legem⁴.

⁴ Liv. XLV. 21.

Cum in Capitolio rogationem eam Ti. Sempronius Trib. pl. ferret, et Privatis lege dicendi locus esset, nec ad suadendum, ut in re minime dubia, quisquam procederet, Ser. Galba repente processit⁵.

⁵ Id. ibid. 36.

Of these Debates We have many Instances left us by the ancient Writers. Thus *Tully*, when He was Praetor, promoted the Bill for the Continuation of *Pompey's* Power, called the *Lex Manilia*, in which He was opposed by *Q. Hortensius*. The same *Cicero*, when He was Consul, spoke against the *Lex Agraria*. So We find *Q. Fabius Maximus* engaged for the *Lex Cincia*, *Cn. Pompeius*, for the *Lex Cornelia*. *C. Laelius* and *Scipio* opposed a Motion of *C. Papirius* the Consul. The same *Laelius*, another of *C. Licinius Crassus*, *de Sacerdotiis*, and both of them successfully. In like manner, *Favorinus* promoted the *Lex Licinia*, *Julius Caesar* the *Lex Plautia*, and *C. Sempronius Gracchus* dissuaded the *Lex Saufeia*. Of *M. Portius Cato*, We find much: In his Consulship He opposed the Motion *de abroganda Lege Oppia*. He supported also the *Lex Maevia*, and the *Lex Voconia*.

⁶ Cic. de Senect. § 5.

Gell. VII. 13. XVIII. 6.

Serv. ad Virg.

I. Aen. 577.

⁷ Fest. pagg. 296. 336.

⁸ Cic. pro L. Manilia. C. Rullum.

Gell. I. 17.

VI. 16.

Manut. de Legg.

Cic. de Amicit. § 25.

Gell. XV. 8.

XIII. 3.

XI. 10.

Priscian. col. 943.

⁹ Liv. VII. 7.

XXVII. 6.

XLV. 21.

¹ Dionys. Halic. IV. 20.

VII. 59.

Liv. I. 43.

Idem Cato Legem Voconiam magna Voce et bonis lateribus suavit, annos LXV. natus, Caepione et Philippo iterum Cos⁶.

But whether He maintained or opposed the *Lex Orchia*, may be a Question, for all We can gather from *Festus*: who gives it both ways⁷.

Many more Instances might be collected, but these are sufficient, and my Reader will find the Authority for them in the Margin⁸.

It was now the proper Time for the Interposition of the Tribune, who by his *veto* had a Power of putting a Stop to all Business; which was called *Legi intercedere*⁹. If nothing of this kind interfered, after some religious Ceremonies, they proceeded to what was called *Sortitio*, which was thus: After the Establishment of the Classes and Centuries, it prevailed for some time, that the Centuries of the first Class, which was a Ballance for all the rest, were called to give their Votes first; which frequently determined the whole Process. For if They concurred in Opinion, it was needless to take the Sense of the Rest, as We have seen formerly¹. If there was a Necessity, the others were called in their Order, till a Majority of Centuries was obtained. This Method, after some Continuance,

tinuance, was altered, and the Centuries not called out by any Preëminence, but by Lot. A Box (*Vrna* or *Sitella*) was produced, and the names of the XXXV. Tribes upon Billets or Tickets thrown in: and the Box being shaken, each Tribe voted in the Order in which they were drawn out. And not only the Tribe, but the Century under that Tribe was determined in the same Method. For We have lately seen the Centuries thrown into the Tribes, and involved in that Distribution. The Tribe which was first drawn was called the *Praerogative Tribe*, and the Century in that Tribe the *Praerogative Century*. And the person first called, *Honoris Causa*, in that Century, was called *Primus*²:

————— *Pingit solennia Campus,
Et non admissae dirimit suffragia Plebis,
Decantatque Tribus, et vana versat in urna:
Nec coelum servare licit*³.

There is an Allusion to this *Praerogative Tribe* (or Century) in a Passage of *Tully*⁴, where there is a Hint at some foul Play in the Balloting, or returning the *Praerogative Tribe* in the Election of Officers. My Reader will remember that the same *Comitia* which were held for enacting Laws, were held for this Purpose also, and the same Method of Proceeding observed in both Cases alike:

————— *Q. Metellum: qui quam isti sit amicus, attendite. Dedit enim praerogativam suae voluntatis ejusmodi, ut isti pro praerogativis eam reddidisse videatur.*

The Lots being drawn for the Tribes and Centuries, the Proposer of the Law directed every Man to repair to his Tribe or Century by these solemn words:

SI VOBIS VIDETVR, DISCEDITE, QVIRITES⁵.

The Votes were given for some time by word of mouth, *ANTIQVO*, or *VTI ROGAS*, the first, if they were against the Bill, the second, if they were for it. But about the Year 614, *A. Gabinius, Trib. pl.* carried a Question, which was afterwards called *LEX TABELLARIA*, or from the Author, *LEX GABINIA TABELLARIA*, that every Man should vote, in the Election of Officers, not by word of mouth, but by Ballot. Two of these were given to every Voter, the one inscribed *A. i. e. ANTIQVO*, the other *V. R. i. e. VTI ROGAS*. Two Years afterwards, *L. Cassius Trib. pl.* of a Family very remarkable,

*L. Cassius ex familia tum ad ceteras res, tum ad judicandum, severissima*⁶.

² Cic. pro Planc. § 14.
Ascon. Pedian. in Cic. Divin. Liv. X. 22.
XXVII. 6.

Sigon. de Antiq. Jur. Ital. II. 2.

³ Lucan. V. 392.

⁴ Il. Verrin. 10.

⁵ Liv. II. 56.
Ascon. in Cic. pro Balbo.

⁶ Cic. II. Verrin. 10.
proposed

proposed a Law, that such Ballots should be used also in the Courts of Judicature, inscribed *A. i. e. ABSOLVO, C. CONDEMNO. N. L. NON LIQVET.* Which Circumstance is recorded in the Medals of the *Cassian* Family⁷.

⁷ Fulv. Vrsin.
Fam. Rom.
pag. 67.
L'ebe's Gotha
Nummaria,
p. 224.



Next to this *A. 621. C. Papirius Carbo* introduced them into the *Comitia*, for the Purpose We are now considering:

Sunt quatuor Leges Tabellariae: quarum prima de Magistratibus mandandis: ea est Gabinia, lata ab homine ignoto et sordido. Secuta biennio post Cassia est, de Populi judicio—Carbonis est tertia de jubendis legibus ac vetandis—Vno in genere relinqui videbatur vocis suffragium, quod ipse Cassius exceperat, Perduellionis. Dedit huic quoque judicio Coelius tabellam⁸.

Cic. III. de
Legg. 16.

D'Arnaud. II.
Var. Conject.

27.

⁹ Cic. in Pison.
§ 40.

Val. Maxim.

IX. 12. 7.

Plin. XXXVI.

H. N. 15.

¹ III. de Legg.

17.

These were distributed to the Voters by Officers called *Diribitores* or Distributors. (The word *Diribere* often occurs in the Roman Writers⁹), and sometimes *Distributores* and *Divisores* also, words of the same Import. After the Receipt of their Billets, they were to proceed over an extempore Stage of Planks, raised on purpose, and called, from their Likeness, *Pontes*: in number thirty five, or one hundred and ninety three, according as the *Comitia* were *Tributa* or *Genturiata*. From the Straightness of the Way, I should conclude, they voted *viritim*, to prevent the bad Consequences that might arise from the Votes of a disorderly Multitude. These *Pontes* are mentioned by *Cicero*¹:

Pontes Lex Maria fecit angustos.

It was in this Pass, that People of sixty Years, or upwards, were objected to, and refused the right of Suffrage. For as Sexagenarians (and all the Female Sex inclusively) could not be Members of the *Comitia*: as
They

They could not be compelled to execute any public Office after that Age, so the younger Sort thought it unreasonable, they should be indulged their Suffrage, and thrust them by, as they came along. Whence the Phrase *Depontani Senes* :

Quo tempore primum per Pontem coeperunt Comitiis suffragium ferre, Juniores conclamaverunt, ut de ponte deicerentur Sexagenarii, qui jam nullo publico munere fungerentur ².

² Fest. v. SEX-
AGENARIOS.

Habeo etiam dicere, quem contra morem Majorum minorem annis sexaginta de ponte in Tiberim dejecerit ³.

³ Cic. pro
Roscio, § 35.

Pars putat, ut ferrent Juvenes suffragia soli, Pontibus infirmos praecipitasse Senes ⁴.

⁴ Ovid. VI.
Fast. 33. Add.
Macrob. I.
Saturn. 5.

As at one end of the Bridge, they received their Billets from the hands of the *Diribitores*, so at the other, they returned them to Officers, called *Rogatores*, who were placed there with Boxes or Urns to receive them ⁵. But as both these Offices lay open to Corruption (and *Tully* has recorded some Instances of it) they were sometimes chequed by Inspectors, *Custodes*, placed over them; sometimes People of the first Character, to prevent Collusion, would execute these Offices in their own person. For these *Custodes*, I find *Pliny* quoted in his *N. H.* ⁶ and their number there said ⁶ XXXIII. 2. to be nine hundred. And they are not omitted by *Tully* :

Hoc certe video, quod indicant tabulae publicae, Vos Rogatores, Vos Distributores, Vos Custodes fuisse Tabularum ⁷.

⁷ Cic. in Pison.

Quando illa dignitate Rogatores, Diribitores, Custodesque vidistis ⁸ ?

⁸ § 15.
Id. post Re-
dit. in Senat.
§ 11.

The People, after they had given their Votes, were immediatly inclosed behind Rails or *Cancelli*, set up for that Purpose (to prevent Confusion in the Assembly, or any foul play) and called with great Simplicity, from their likeness to Sheep-Pens, OVILIA.

Miserae maculavit ovilia Romae ⁹.

⁹ Lucan. II.
197.

These are thought to be expressed in a Denarius of the *Silian* (or *Licinian*) Family ¹.

¹ Fulv. Vrsin.
Famil. Rom.
pag. 149.
Spanheim. de
Vitu et Praest.
Numism.
Dissert. X.
p. 192.
Havercamp.
Thes. Morell.
pag. 239.



After each Tribe (or Century) had passed by, the Suffrages or Votes of that Tribe (or Century) which had been marked with Dots or Points, were cast up:

B b

Nam

*Nam quod questus es, plures Te testes habere de Voltinia, quam quot in ea Tribu puncta tuleris*⁸——

⁸ Cic. pro Planc. § 22.

⁹ Epist. ad Pisones. 243.

Hence in Horace,——*Omne tulit punctum*⁹.

¹ Varro III. de R. R. 2.

² III. ad Q. Fr. 4.

³ Id. pro Plancio. § 6.

⁴ V. 393.

⁵ y 185.

⁶ ad Virg. II. Georg. 502.

⁷ Alex. Donat. de Aedif. Romae Vet. et Recentis. II. 10.

⁸ Gruter. XXVI. 3.

⁹ Serv. ad Virg. VIII. Aen. 322.

¹⁰ Sueton. Vespas. § 8.

¹¹ Cic. III. Philip. 12.

¹² Polyb. III. Hist. 26.

¹³ Cic. II. Philip. 37.

¹⁴ Varr. de L. L. IV. extr.

¹⁵ Rhemnius Fannius.

It is probable also, that the Tables were numbered, as Tallies. And this was called *Dirimere Suffragia*¹. So the Critics restore this Passage in Tully²:

Quid plura de Judicibus? Duo Praetorii sederunt, Domitius Calvinus; is aperte absolvit, ut omnes viderent: et Cato; is, diremptis tabellis, de circulo se subduxit, et Pompeio primus nunciavit.

And this also:

*Nibil jam est, quod populo supplicetur: Nihil quod Diremptio, nihil quod Supplicatio Magistratum, Renunciatio Suffragiorum expectetur*³.

So Lucan, quoted lately⁴:

Et non admiffae dirimit suffragia Plebis.

And hence Terentianus⁵ has borrowed his Expression:

Vicinia Vocum, modico dirempta puncto.

The Law, thus made, was confirmed by the Oaths of the Citizens, was commonly engraved upon Copper, and set up in the Treasury: Which Treasury, *Securitatis causa*, was in the Temple of Saturn and Ops, in the Jugarian Street, at the Foot of the Capitol. Servius⁶ informs us, that the Treasury was kept in the Temple of Saturn, and was called *Aerarium Saturni*; but it belonged to both Deities, as I have put it⁷.

LOCVS ADSIGNATVS AEDI OPIS ET SATVRNI
L. MVNATIO VERO ET C. TERENTIO FELICE
CVRAT. OPER. PVBL⁸.

I may possibly have occasion to speak more hereafter upon the Confidence which the Antients had in their Temples as the Depositaries of Things of Value, viz. MONEY, RECORDS, WILLS, etc. Thus the Capitol, or, which is the same thing, Temple We have been speaking of was entrusted with their Laws and public Instruments⁹. It was a kind of Bank for Money, and accordingly M. Antony plundered it of a large Sum, that belonged to Octavius¹⁰. It was here they kept their Standard Measures, *Trutinae, Lances, Mensurae*, etc.

*Trutina — in aede Saturni — propter pensuram*¹¹.

Thus the *Amphora Capitolina*:

—— *Quam, ne violare liceret,*

*Sacravere Jovi Tarpeio in monte Quirites*¹².

And

And thus :

MENSVRAE AD EXEMPLVM
EARVM QVAE IN CAPITOLIO SVNT
AVCTORE SANCTISSIMO AVG. N.
NOBILISSIMO CAIS.
PER REGIONES MISSAE CVR...D. SIMONIO
IVLIANO PRA.....IP. V. ⁴

⁴ Reinesf. IV.
¹⁶.

There are now in the Jesuits' College at Rome two of these Brasses Standard Weights, as they are supposed to be from their Inscription :

TEMPL. OPIS AVG. II.

and

TEMPL. OPIS AVG. V. ⁵

⁵ Id. II. 57.

The Law (whether *Lex* or *Plebiscitum*) was called *nomine Conditoris*, or *Rogatoris*; and by his nomen *Gentile*: If both Consuls preferred the Motion, it was called by both their names jointly,

Lex Aelia Sentia,
Fufia Caninia,
Junia Norbana.

To the name of the Proposer, They sometimes added the Subject, as

Lex Cassia, Agraria,
Gabinia, Tabellaria,
Cornelia, Sumptuaria,
Julia, Judiciaria.

And this became more necessary, when One Family was either numerous in itself, or frequent in this Transaction, as the *Julian* and *Cornelian*.

But let it be considered, that every Law had not its name from the Proposer, but some from the Person who administered the occasion. The *Lex Scantinia*, mentioned by *Juvenal* ⁶ and others, was called *non ab Authore Legis, sed ab Authore Facinoris*. In like manner, the *SCtum Macedonianum*, as We have seen formerly ⁷, from the Usurer *Macedo* ⁸. And thus the *Lex Hostilia* is fondly imagined, by a good Writer ⁹, to take its name from the Contents of it :

⁶ II. Sat. 44.

⁷ pag. 156.

⁸ Gothofred.
ad l. 1. D. de
SCto Macedo-

don.
⁹ Nerii I. A-
nalect. 26.

Lege Hostilia permissum erat furti agere, eorum nomine, qui apud hostes essent, aut Reip. causa abessent ¹.

Though this be the only place, where mention is had of this Law ², and little therefore to be gathered concerning it, yet, as We find a Consul of this name, viz. A.V.C. 583, I have no scruple of giving it him, upon the force of common Practice, in spite of Silence, which proves nothing.

¹ J. 4. 10. pr.
² Cujac. XI.
Obierv. 38.

The Honor which a good Motion reflected upon the Family, is seen in many Instances; of which these two may serve for an Example:

It was a Practice in their Funerals, *ut Legum latorum tituli, victarumque Gentium vocabula anteferrentur*⁴.

The Memory of them is often preserved in the Coins of the Family, of which I have lately produced some Specimens⁵.

The Forms of the Roman Laws, and *Plebiscita*, may be seen in several Writers⁶. I have given⁷ one above from *A. Gellius*. *Brissonus*⁸ may be consulted upon this occasion, who is large upon the Subject, and indeed upon the Subject of this whole Section.

Let me close this Head with observing, that many of the ancient Lawyers were employed in commenting upon some of their own Laws, the Loss of which Discourses We have great reason to regret: as *Maximus ad L. Falcidiam*, *Paulus ad L. Aeliam Sentiam*, *ad L. Juliam, Velleiam, Cinciam, Falcidiam*, and in his Commentary *de Jure Patronatus*, or, in other words, *ad L. Juliam Papiam*. *Mauricianus*, *Terentius Clemens*, *Marcellus*, *Caius* and *Vlpian*, wrote several Books *ad Leges Romanas*, some of which were Voluminous.

By the Moderns, several Laws have been handled separately, their Fragments collected, and a great Light thrown upon the Roman Law by these Performances. They are many: I shall select the most considerable.

Lex,

<i>Aquilia</i> —————	{ Balduin. Noodt.	
<i>Ateria Tarpeia</i> ———	Koolius	} <i>apud</i> Otton. Thes. J. R.
<i>Atinia</i> —————	Pulveius	
<i>Cincia</i> —————	{ Ranchinus II. Var. 7. Burgius I. Elect. 18. Brummerus.	
<i>Falcidia</i> —————	{ Balduin. Hufman. <i>apud</i> Otton. Thes. Wieling. Lect. J. C. II. 29. — 32.	
<i>Glicia</i> —————	Cujac. XV. Observ. 14.	
<i>Julia Majestatis</i> ———	Contius.	
<i>de Adulter.</i> ———	Brissonus.	
<i>de Fundo Dotali</i> ———	Prateius. <i>apud</i> Otton. Thes.	
<i>Julia et Papia Poppaea</i>	{ Balduin. Gothofred. Heineccius.	
<i>Laetoria</i> —————	Cujac. XIX. Observ. 33.	
<i>Remmia</i> —————	Breneman	} <i>apud</i> Otton. Thes.
<i>Velleia</i> —————	Taurellius	
<i>Voconia</i> —————	{ Balduin. Perizonius. Wieling. Lect. J. C. II. 19. — 22.	

PLEBIS-

⁴ Tacit. I. Annal. 8.

⁵ See more, Havercamp. Praef. Thes. Morel. and in Gente PAPIA, PORTIA, etc. Fulv. Visin de Famil. Rom. pag. 67. et 149.

⁶ Liv. XXVI. 33.

Frontin. de Aquaeductib. Censorin. de Die Natali C. 24.

Sigonius, in Graev. Thes. Tom. I. fin. Reines. Inscript. VII. 10.

⁷ pag. 9.
⁸ de Form. lib. 2.

PLEBISCITUM.

*Tribuno Pl. interrogante*¹.

¹ J. 1. 2. 4.

THIS Plebeian Officer was created *A. V. C.* 260, upon a Seceſſion of the Plebs, complaining of the great Oppreſſion of the Patricians, to whom they were bound for Money².

² D. 1. 2. 2. 20.

*Tanta igitur in illis Virtus fuit, ut anno decimo sexto poſt Reges exactos, propter nimiam dominationem Potentium, leges ſacratas ipſi ſibi reſtituerent, duos Tribunos crearent, montem illum trans Anienem, qui hodie Mons ſacer nominatur, in quo armati confederant, aeternae memoriae cauſa conſecrarent*³.

Liv. II. 33.

Cic. Fragm.

pro Corn. init.

Appian. B.

Civ. init.

³ Cic. 1. c.

Dionyf. Halic.

VI. 89.

Gell. XIII. 12.

XV. 27.

Rofinus.

Gravina.

⁴ Liv. III. 30.

They were firſt only two in number: in thirty fix Years time, They were increaſed to Ten⁴.

Their Powers were conſiderably abridged by *Sylla* the Dictator, whoſe Ambition and Intereſt was conſtantly croſſed by the Plebeian Party. They were afterwards reſtored to their ancient Authority, and by the Emperors the *Tribunitia Potestas* was frequently aſſumed among the Imperial Titles, down as far as *Conſtantine M.* when We hear no more of this Officer or Office. One great Reaſon why the Emperors affected this Title was, becauſe the Perſon of the Tribune was held ſacred, the Laws by which they were firſt appointed, were called *Leges Sacratae*, and the Place, as We have ſeen, *Mons Sacer*. Whence *Vopifcus*⁵ calls the *Tribunitia Potestas*, *partem maximam Regalis Imperii*. Thus whoever violated, or even affronted their Perſons, diſputed their Authority, or checqued their Proceedings, was puniſhed with Death or Banishment, with Confiſcation of Goods with Outlawry; after this form:

⁵ in Tacit.

init.

Campian. de
Magiſtr. p. 17.

⁶ Liv. III. 55.

Dionyf. Ha-

lic. VI. 89.

Hotoman.

Antiqq. L. I.

in Legg.

SACRATA

IVNIA. et in

Magiſtr.

TRIB. PL.

Fest. v.

SACRATAE

LEGES.

⁷ Feſtus v.

SACER MONS-

⁸ Quaest. Rom.

81.

QVIALITER FAXIT CVM PECVNIA FAMILIAQVE SACER ESTO:
SEI QVIS EM OCCISIT PARICEIDA NEC ESTO⁷.

They were not ſo much Magiſtrates, as Guardians of the Liberty of the People (or *Plebs*) againſt the Conſuls, Senate, and Patricians. *Plutarch*⁸ affirms, that They could not be looked upon as Magiſtrates, becauſe They wanted the Purple Garment, Liſtors, *etc.* and becauſe the *Tribunitian Office* laſted, upon the Creation of a Dictator, who alone repreſented all the *Magiſtrates* of Rome. Though that laſt Argument of *Plutarch* proves but little, however I cannot but think, that when they are called *Magiſtrates* by ſome Roman Writers, there is ſome Impropriety in the Expreſſion.

Tully in his Book *de Legg.* had an eye upon the Conſtitution of his Country, when He thus lays out their Authority:

Plebes

*Plebes quos pro se contra vim auxilii ergo decem creasset, Tribuni ejus sunt: quodque ii prohibessint, quodque plebem rogassint, ratum esto, sanctique sunt*⁹.

* Cic. III. de Legg. 3.

¹ Gell. XIII.

¹².

² Dion Cassius XXXVII. 50. XXXVIII. 6.

³ III. de Legg. 3.

Though They had properly no Jurisdiction, and could not hold Plea, nor summon into Court, yet They had their Officers to seize and commit to Prison¹. A Power which They sometimes exercised over Consuls and Censors². Yet their own Persons were not to be seized by any Magistrate whatsoever: and many Laws were made in favour and support of their Authority, as the *Lex Horatia, Junia, Icilia, Duilia*. This Officer was so dear to the People, that it was enacted by one of the Laws now mentioned, *ut qui Plebem sine Tribunis reliquisset, tergo et capite puniretur*. And accordingly, *Tully* adds to his Description of the Tribune's Office, *Neve Plebem orbam Tribunis relinquunt*³. It was with the same Precaution, that his House was never shut by night, that there might be perpetual means of Access to him: and He was never allowed to be out of the City a whole day together. Upon the same Principle, his Office did not expire upon the Appointment of a Dictator, when all other Magistracies did. For, as He was a Checque upon the public Magistrates, and the Protector of the People's Liberties, his Office at that time seemed more necessary than ever.

This Power was rigorously kept among the Plebeians, when all the others were shared indifferently between the Plebeians and Patricians. In order therefore to be qualified for it, the Patricians would frequently get adopted into Plebeian Families. Which was practised by *Clodius*, in order to persecute his old Enemy, *Cicero*⁴.

⁴ Cic. pro Domo ad Pontif. § 13. 14.

The Power of this Officer consisted in two things, *in Prohibendo*, and *in Rogando*. In virtue of the former, He had a Place in the Senate, but no Vote, and by his single Negative, or *Veto*, by the single *Veto* of any one of the Number, all Proceedings were stopped⁵.

⁵ Liv. III. 55. VII. 17. XXVII. 6. XLV. 21. Gell. XIII. 12.

In virtue of the other, *viz Rogando*, He had a Right to summon the People to the *Comitia Tributa*, (where the Patricians also might be present and vote, if they pleased, but could not be compelled, nor were they summoned) and there propose a Question, which, if it passed into a Law, was therefore called *Plebiscitum*, i. e. *Scitum Plebis*⁶.

⁶ J. I. 4. D. I. 2. 2. 8.

*Scita Plebis appellantur ea, quae Plebs suo suffragio sine Patribus jussit, plebeio Magistratu rogante*⁷.

⁷ Festus in v.

For *Sciscere*, *Scire*, etc. like *Γινώσκων* of the Greeks is the same with *Statuere*.

⁸ D. 46. 3. 98 ult.

*Denique Lex XII. Tab. tignum aedibus junctum vindicari posse scit*⁸.

⁹ Plaut. Curcul. IV. 2. 23.

*Rogitationes plurimas propter vos Populus scivit, Quas Vos rogatas rumpitis*⁹.

PLEBISCITVM.

199

Quae scisceret Plebs, aut quae Populus juberet ¹.
Quid quod multa perniciose, multa pestifere sciscuntur ².

Durius Athenienses — sciverunt, ut *Aeginetis*, qui classe valebant, pollices praeciderentur ³.

Nunc munera Martis
Aequent imperio, et Solem concedere Nocti
Sciscant ⁴.

These Laws at first bound only themselves, not the Patricians, and were not properly Laws; but owed their Strength chiefly to Compact and Connivance, rather than proper Authority, which they had not *ob defectum Majestatis*.

Afterwards *A. V. C.* 467, by a Law of *Q. Hortensius* ⁵, the Dictator, they bound the whole People, who by this Act consented to be bound ⁶; for *Lex, proprie dicta*, is, as We have seen, *communis Sponsio Civitatis*. Instead of *Lege Hortensia* some Copies of the Institutes read, and some Civilians prefer, *Lege Horatia*. That Case may be best apprehended by consulting the History of these Proceedings, as they are related by some who seem to have considered them most accurately ⁷:

A. V. C. 260. *Secessio in montem Sacrum*. The Constitution of the Tribunitial Power, and a Decree, *ut id ratum esset, quod Plebs ad se per Trib. Pleb. latum jussisset* ⁸.

A. V. C. 306. A Second *Secessio in montem Aventinum*. *M. Horatius Barbatus*, and *L. Valerius Potitus Coss.* the Year of the Abdication of the *Decemviri* *LEX HORATIA, ut quod Tributim Plebs jussisset, Populum teneret* ⁹.

Qua Lege Tribunicis Rogationibus telum acerrimum datum est ¹.

A. V. C. 415. *Publius Philo Dictator*. A Law to explain and amend the Act of 306, where the word was *Populum*; viz. that *Plebiscita* should oblige all the *Quirites* ². This Dictator is sometimes called *Pubilius*, and this Law, *LEX PVBLILIA*.

A. V. C. 467. *LEX HORTENSIA. Hortensius Dictator. Secessio in Janiculum* ³. The Patricians had attempted to frustrate the *Lex Horatia*. And now the People were pacified with the Ratification of it, by the *Lex Hortensia*.

Tribuni neque advocant Patricios, neque ad eos referre ulla de re possunt: Ita ne Leges quidem proprie, sed Plebiscita appellantur, quae Tribunis pl. ferentibus accepta sunt. Quibus Rogationibus ante Patricii non tenebantur, donec Q. Hortensius Dictator eam legem tulit, ut eo jure, quod Plebes statuisset, omnes Quirites tenerentur ⁴.

Q. Hortensius Dictator, cum Plebes secessisset in Janiculum, legem in Esqueto tulit, ut quod Ea jussisset, omnes Quirites teneret ⁵.

This History is, in some parts of it, controverted by other Writers ⁶.

Thus

¹ Cic. pro Flacco. § 7.
² Id. de Legg. II. 5.

³ Id. III. Offic. 11.

⁴ Silius Ital. VII. 543.

⁵ J. 1. 2. 4. D. 1. 2. 2. 8.
⁶ C. 2. 3. penult.

⁷ Funccius de Senect. LL. pag. 445.

⁸ Liv. II. 33.

⁹ Liv. III. 55.

¹ Liv. I. c.

² Liv. VIII. 12.

³ Epit. Liv. lib. XI.

Augustin. de C. D. III. 17.

⁴ Gell. XV.

27.

⁵ Plin. XVI.

10.

⁶ See Muelen. ad tit. de J. et

J. § 7. et ad

Pompon. de

O. J. § 8.

Connan. Com-

ment. J. C. I.

13.

Stryk. Prae-

cogn. Juris,

C. 1. § 22.

Struv. Exer-

cit. 1. th. 6.

pag. 36.

Jac. Maestert.

de J. L. R. 11.

Dub. 13.

Ant. Contius I.

Leet. Subsec.

8.

Govean. I.

Var. Lect. 33.

Thus *Plebiscita* became Laws :

*Ita factum est, ut inter Plebiscita et Legem Species constituendi interessent : Potestas autem eadem esset*⁷.

*Sed et Plebiscita Lege Hortensia lata non minus valere, quam Leges coeperunt*⁸.

Thus the *Lex Aquilia*⁹, *Sempronia*, *Apuleia*, *Clodia*, *Scribonia*, *Falcidia*, *Voconia*, *Furia*, were indifferently called *Leges* or *Plebiscita*.

To close with the

COMITIA TRIBUTA.

We have seen the Distinction between the *Comitia Curiata* and the *Comitia Centuriata* of the Romans, in the last Section : It is proper to consider the third Sort, the *Comitia Tributa*, in this. The Account given of each of these by a Writer in *A. Gellius*¹ stands thus :

Quum ex Generibus Hominum Suffragium feratur, Curiata Comitia esse ; quum ex Censu et Aetate, Centuriata ; quum ex Regionibus et Locis, Tributa.

Forgetting therefore, that there ever were such Assemblies, as the *Curiata*, We find the Sense of the Roman People *ordinarily* taken in that Council, which *Servius* established by a Digestion of his Subjects according to Age, Quality, and Condition, and called it the *Comitia Centuriata*. It was in this They held the Elections of Magistrates, the Trials of Offences, the Deliberations about Peace and War ; and here were all Matters adjusted, relating to Legislation, to Adoptions, and to Last Wills and Testaments. In a word, it was the *only* Assembly for transacting public Business. Upon this Account it was never called but by the Officers of the first Distinction, and held with very extraordinary Rites and Solemnities, *viz.* with those kind of Religious Services, which were appropriated to the Patricians, to the Exclusion of the other part of the Subject :

*Penes quos igitur sunt Auspicia more Majorum ? Nempe penes Patres. Nam plebeius quidem Magistratus nullus auspiciato creatur. Nobis adeo propria sunt Auspicia, ut non solum quos populus creat Patricios Magistratus, non aliter, quam auspiciato creet : Sed Nos quoque ipsi sine suffragio populi auspiciato Interregem prodamus, et privatim auspicia habeamus, quae isti ne in Magistratibus quidem habent*².

This was therefore *one* great and essential Difference between the two Assemblies.

Νόμον

⁷ D. 1. 2. 2. 8.

Add.

G. il. X. 20.

⁸ J. 1. 2. 4. fin.

Augustin. de

Legg. c. 1. 3.

et in Horten-

sia.

Manut. de

Legg. c. 3. 1.

Hotoman.

Antiqq. Rom.

I. 1.

Lycklama de

Magistr. c. 4.

Pighii Annal.

Rom. p. 386.

et 409.

Muelen. ad

Pompon. § 8.

Rosin. An-

tiqq. Rom.

VIII. 7.

Blond.

Triumph.

Rom. 4.

Sigonius de

Antiquo Jure

Civ. Rom. l. 5.

Panvin. de

Civit. Rom.

c. 68. et 70.

⁹ Nov. 18. 8.

D. 9. 2. 1.

J. 4. 3. 15.

² XV. 27.

¹ Liv. VI. 41.

Νόμον εἰσφέρει περὶ τῶν δημαρχικῶν ἀρχαρεσιῶν, μετὰ τὴν αὐτὰ ἐκ τῆς Φρατριάκῃς ψηφοφορίας, ἣν οἱ Ῥωμαῖοι Κερίαντην καλεῖσι [Κεν/ερίαντην *Glareanus*³] ἐπὶ τὴν Φυλεϊκὴν. τίς δὲ τῶν διαφορῶν τῶν ἀρχαρεσιῶν, ἢ γὰρ σημανῶ. τὰς μὲν Φρατριάκας ψηφοφορίας εἶδει, προεβλευσταμένης τῆς Βελῆς, ἢ τῆς πλῆθους κατὰ Φρατριάς τὰς ψήφους ἐξενέγκαντες, καὶ μετ' ἀμφοτέρω ταῦτα τῶν παρὰ τὴν δαμονίαν σημείων τε καὶ οἰωνῶν μηδὲν ἐναντιωθέντων, τότε κυρίας εἶναι. τὰς δὲ Φυλεϊκάς, μήτε προεβλεύματες γινομένης, μήτε τῶν ἱερῶν τε καὶ ὀωνοσκοπῶν ἐπιθεσπισάντων, ἐν ἡμέρᾳ μιᾷ τελεομένης ὑπὸ τῶν Φυλεῶν τέλει εἶναι.*

³ Vid. Dra-
kenb. ad Liv.
II. 56.

⁴ Dionys.
Halic. IX. 4r.

Hence it was, that the Patricians being seized of the *Auspicia*, and many religious Rites, would frequently disappoint the Commons (who had an Interest in a Bill, or a point to carry) under a Pretence of Religion, and make an Adjournment, in order to gain time for Canvassing. It was called *Obnunciare*, when they reported the Auspices to be unfavourable. The Ancients distinguished thus between *Obnunciare* and *An-*
nunciare.

⁵ Cic. II. ad
Q. Fratr. 6.
III. de Legg.
12.

Zonaras VII.
19.
P Manutius
de Legg. c. 36.
Merul. de
Comitiis c. 3.
Struv. Antiqq.
Rom. Synt.
VI.

⁶ Ter. Adelph.
IV. 2. 7. See
Donatus.

Primus sentio mala nostra: Primus rescisco omnia:
Primus porro OBNUNCIO.

But the *Comitia* by Tribes had nothing of all this, were opened with little or no Ceremony, were not disturbed by the Report of any bad Omens, and did not admit of Adjournment.

But other Differences We find, many and material.

2. In the one case the Senate was to be consulted, in the other it needed not. This was a very extraordinary Step. The Senate had a Negative in the former Instance, which these Popular Assemblies disregarded, and went to work without them.

3. Besides the Difference between *Lex* and *Plebiscitum*, Capital Crimes, and those of a higher nature, were cognizable in the *Comitia Centuriata* only: in the other, the Punishments never extended beyond Fine and Banishment. In the same regard, the Great Officers were chose in the former, and the Plebeian in the latter.

4. The general Sense of the People (universally) was better had, when the Suffrages of every Individual were equally valid. When Rome voted by her Centuries, the Ballance was with the better Sort: and that Multitude,

* *Legem promulgavit de Electione Tribunorum, eam quidem ex Curiatis [Centuriatis] quae eo nomine a Romanis appellantur, in Comitia Tributa mutans. Quodnam autem sit horum Comitiorum discrimen, ego declarabo. Curiata Comitia oportebat, praecedente SCto, et suffragiis a plebe Curiatim latis, atque post hoc utrumque signis divinis avibusque non adversantibus, tunc demum rata esse: Tributa vero Comitia sine SCto, atque sine Sacrificiis, nullisque avibus addicentibus, uno die a Tribubus peragi.*

which composed her lowest Century, was very rarely consulted: σπανίως δὲ πρῶτον πρῶτον ἔτις ἐνδοιαζόμενον ἐνέπιπτεν, ὥς ἐμέχρι τῆς ἐσχάτης ψήφου τῆς

* Dion. Halic. τῶν ἀπορωτάτων προελθεῖν.*
VII. 59.

Εἰ δὲ — εἰς ἴσα μέρη σχισθεῖεν αἱ τῶν ἐκατὸν ἐννεήκοντα δύο λόγων γνώμαι, τότε τὸν ἐσχάτον ἐκάλει λόχον, ἐν ᾧ τὸ τῶν ἀπόρων, ἔτι δὲ τῶν ἀφαιμένων ἀπάσης στρατιάς τε καὶ εἰσφορᾶς, πολλῶν πληθύνον ἦν. — Τὸ δὲ ἦν σπάνιον καὶ μακρὰν ἀπέχον ἀδυνατεῖν. Τὰ πολλὰ μὲν γὰρ ἐκ τῆς πρώτης κλήσεως τέλει ἐλάμβανεν, ὀλίγα δὲ μέχρι τῆς τετάρτης πρῆβαιεν ἢ δὲ πέμπτῃ κλήσει ἢ ἡ τελευταία παρέρχοντο. †

† I. IV. 20.

5. They differed also in the Place of holding them. The *Tributa* were often in the *Campus Martius*, in the *Prata Flaminia*, afterwards called the *Circus Flaminius*, in the *Forum*, the *Lucus Petelinus*, the *Capitol*, etc. and several other unconsecrated and profane Places. For they were held, *sine auspiciis*, with little or no religious Ceremony, (differing herein from the Assembly of the Centuries) and therefore at liberty within or without the *Pomoerium*.

The Thought of this Assembly was first struck off by the People in the case of *Coriolanus*, *A. V. C.* 262. The Roman *Comitia* We have seen to be held principally upon these three Occasions: 1. For the Trial of Roman Citizens. 2. For the Election of Magistrates and Officers. 3. For the Establishment of new Laws, and the Abrogation of old ones. When the Cause therefore of *Coriolanus* came on, who was the Idol of the better sort, and the Aversion of the lower, it was impossible to convict him upon the Plan of Judicature which then prevailed. But *Dionysius* will speak for me:

Επιστάσης δὲ τῆς τρίτης ἀγορᾶς, ὃ μὲν ἐκ τῶν ἀγρῶν ὄχλος, ὅσος οὕτω πρότερον, συνεληλυθὼς εἰς τὴν πόλιν, ἔωθεν ἔτι καλεῖσθαι τὴν ἀγορὰν, οἱ δὲ Δήμαρχοι συνεκάλεον τὸ πλῆθος ἐπὶ τὴν Φυλῆτιν ἐκκλησίαν, χωρὶς τῆς ἀγορᾶς περισχοινίσαντες, ἐν αἷς ἐμελλον αἱ Φυλαὶ γήσεσθαι κατ' αὐτάς. Καὶ ΤΟΤΕ ΠΡΩΤΟΝ ἐγένετο Ῥωμαίοις ΕΚΚΛΗΣΙΑ κατ' ἀνδρῶς [omnino cum Lapo et Gelenio κατ' ἀνδρᾶ] ψηφοφόρος ἢ ΦΥΛΕΤΙΚΗ· πολλὰ δὲ ἐναντιωμένων τῶν Πατρικίων, ἵνα μὴ τὸ γένῃαι, καὶ τὴν Λοχίτιν ἀξίεντων συνάγειν ἐκκλησίαν, ὥσπερ αὐτοῖς πάτριον ἦν. †

* VII. 59.

* *Raro autem res tantae ambiguitatis occurrebat, ut usque ad ultimae inopum centuriae suffragia veniretur.*

† *Quod si — suffragia cxcii. Centuriarum divisa pari numero fuissent, tunc postremam Centuriam vocabat, quae continebat multitudinem Civium egenorum, qui propterea omnis militiae et tributi immunes erant. — Hoc vero rarum erat, et vix ulla ratione fieri poterat. Plerumque enim prima vocatione res absoluebatur, raro autem usque ad quartam veniebatur: quinta vero vocatio et sexta erant superfluae.*

‡ *Quum autem dies trinuindini instaret, Turba ex agris, quanta nunquam ante, in urbem confluit, et summo mane forum occupavit, Tribuni vero plebem ad Tributa Comititia vocarunt, et Comitii loca funibus undique clausurunt, in quibus singulae Tribus distinctae, et aliae ab aliis separatae erant futurae. Et tunc primum P. R. Tributis Comititiis viritim suffragia tulit, multum reclamantibus Patriciis, et impedire volentibus ne hoc fieret, atque Centuriata Comititia more patrio habenda censentibus.*

And

And a little below:

Οἱ μὲν ἐν συναγωνιζόμενοι Μαρκίῳ — ἤξιεν καλεῖν τὴν ἀπὸ τῶν Τιμημάτων ἐκκλησίαν, ὑπολαμβάνοντες τάχα μὲν ἀπὸ τῆς πρώτης κλήσεως ὑπὸ τῶν οὐλῶν ἔννεμηνοντα Λόχων ἀπολυθήσεσθαι τὸν ἄνδρα, εἰ δὲ μήγε, ὑπὸ τῆς δευτέρας ἢ τρίτης. Οἱ δὲ Δήμαρχοι ταῦτα ὑφορώμενοι, καὶ αὐτοὶ τὴν Φυλεσίαν ἐκκλησίαν ὥσπερ δεῖν συναγεῖν, ἔτι ἀγῶν ἐκείνῃ ποιῆσαι κυρίαν· ἵνα μήτε οἱ πένητες τῶν πλεσίων μελοινεκλώσι, μήτε οἱ Φυλεσικοὶ τῶν ὀπλιτῶν ἀτιμώμενον ἔχωσι χώραν, μήτε ἀπερριμμένον εἰς τὰς ἐσχάτας κλήσεις τὸ δημοτικὸν πλῆθος ἀποκλείηται τῶν ἰσῶν ψήφων, ἰσόψηφοι δὲ καὶ ἐμότιμοι πάντες ἀλλήλοις γενόμενοι, μιᾷ κλήσει τὴν ψήφον ἐπενέγκωσι κατὰ Φυλὰς.*

² Id. *ibid.*

In process of time, the Plebs still making head got other Branches of the Administration within the reach of these popular Assemblies, or *Comitia Tributa*. It was to the Turbulency of *Publius Volero*³, *A.V.C.* 282, a very factious Tribune, that their complete Establishment was in great measure owing. A Law of his proposing conveyed to them the power of choosing their own Officers, the inferior Magistrates, *etc.* and of concluding at these *Comitia*, πάντα τὰ ἄλλα, ὅσα ἐν τῷ δήμῳ πράττεσθαι τε καὶ ἐπι-
κυρεῖσθαι δεήσει⁴. †

They had gained before the Power of passing Bills [*Plebiscita*] for their own Concerns, *sc.* *A.* 260⁵. So that little now was wanting to the fullness of their Authority.

More of this in the Authors produced in the Margin⁶.

* *Marcii igitur Coriolani propugnatores — poscebant [Centuriata] Comitia, quae ex censu fiebant; sperantes fore ut fortasse a primae classis nonaginta et octo centuriis, sin minus, a secunda saltem, aut tertia absolueretur. At Tribuni hoc suspicati, et ipsi Tributa Comitia habenda esse putarunt, et id iudicium illis committendum, ut neque pauperes deteriore essent conditione, quam divites, neque Tribunes minus honoratum! ocum quam milites graviter armati, haberent; neque plebs in ultimas rejecta classes a suffragiorum aequalitate excluderetur, sed aequo suffragiorum et honorum jure omnes inter e fruerentur, et pariter vocati suffragia Tributim ferrent.*

† *Et quicquid aliud apud populum agi decernique oporteret.*

³ Dion. Halic. IX. 39—49.

⁴ Id. IX. 43. fin.

Liv. II. 56. *etc.*

⁵ See above, p. 198, 199.

⁶ Sigon. de Antiq. Jure C. R. I. 17.

Rosin. VI.

15 — 20.

Panvin. de

Civ. Rom.

c. 68. et seq.

Gruchius et

Sigonius de

Comitiis.

Merula de Co-

mitiis Roma-

nis, cap. 4.

Manut. de LL.

c. 8.

Pighii Anna-

les, Tom. I.

pag. 155.

Gravin. Orig.

J. C. I. 28.

Hotoman.

Antiqq. Rom.

c. 12.

SENATVS CONSVLTVM.

POMPONIVS gives this account of the *SCta*:

Deinde quia difficile Plebs convenire coepit, Populus certo multo difficilius, in tanta turba hominum, necessitas ipsa curam Reipublicae ad Senatum deduxit. Ita coepit Senatus se interponere, et quicquid constitueret, observabatur, idque Jus appellabatur SCtum¹.

¹ D. I. 2. 2. 9.

² J. 4. 2. 5. And much to the same purpose the Emperor³.

One would be apt to imagine from these Accounts, that all *SCta* were subsequent to the *Leges* and *Plebiscita*: and that there was a necessity of devolving upon the Senate the Power of making Laws, upon frequent occasions, instead of the People. Neither of which is true. The Senate was an Institution of Romulus, and we find mention of their Acts or Decrees (whatever they were) as high as the very Being of that Senate⁴. And accordingly when *Vespasian* set about to copy the old Records, we read of *pene ab exordio Urbis SCta, Plebiscita, etc.*⁵.

³ Liv. I. 17.
Dion. Halic.
II. 14. VI. 66.
⁴ Sueton. in
Vespas. § 8.

Pomponius therefore, and the Emperor, wrote for their own times, and as the Law was then circumstanced. I rather choose to distinguish the *SCta* into two Periods, and examine what they were, 1. *Stante Rep.* and 2. *Sub Imperatoribus*. Of which Considerations the Second will better fall under the Head or Section of the IMPERIAL CONSTITUTIONS: The Former shall be the Subject of this.

The Senate was upon the original Plan of *Romulus*, who laid out a Constitution, which was intended to comprehend all the different Forms of Government.

In *Romulus* and his Successors were confessedly all the marks of REGAL AUTHORITY. The Executive Power both in Peace and War, was intrusted to them; and when the Consular State succeeded, the Change was little more than in Name and Duration.

Libertatis autem originem inde magis, quia annum Imperium Consulare factum est, quam quod deminutum quicquam sit ex Regia Potestate numeres⁶.

⁵ Liv. II. 1.

The ARISTOCRACY, which is said to be imagined from the Lacedaemonians, was preserved in the Senate: A Council, which the same Monarch appointed by selecting one Hundred of his principal Subjects; whom rather perhaps from their Care, Station and Dignity, than the Consideration of their Years, he called *Patres* and *Senatores*⁷.

⁶ Liv. I. 8.
Dionys. Halic.
II. 12.
Festus.
⁷ Sallust. B.
Catilin. 6.

Delecti, quibus corpus annis infirmum, ingenium sapientia validum erat, Reip. consultabant. Hi vel aetate vel curae similitudine Patres appellabantur⁷.

Quae

*Quae, nisi esset in Senibus, non summum Concilium Majores nostri ap-
pellassent Senatum. Apud Lacedaemonios quidem ii qui amplissimum
Magistratum gerunt, ut sunt, sic etiam nominantur, Senes*⁸.

⁸ Cic. I. de
Senecl. 6.

The DEMOCRACY was expressed in the *Populus Romanus*, who had a Right in three very important Branches of Government: 1. Legislation: 2. Declaring War and Peace: 3. Election of Magistrates⁹. The most im-
portant of which was Legislation. And yet the People were not so totally
intrusted with this, but that the Senate, by their Weight and Authority,
had a considerable Checque upon their Transactions, in what was per-
haps the primary and original Idea of the *Senatus Consultum* or *Decretum*.

⁹ Dionys. Ha-
lic. II. 14. VI.
66.

Τῷ δὲ δημοτικῷ πλήθει τρία ταῦτα ἐπέτρεψε [Romulus], ἀρχαυρεσιάζειν,
νόμους ἐπικυροῦν, περὶ πολέμου διαγινώσκειν, ὅταν ὁ βασιλεὺς ἐφῇ, ὅδε
τέτων ἔχοντι τὴν ἐξουσίαν ἐπίληπτον, ὡς μὴ καὶ τῇ Βελῇ ταῦτα δοκῇ.*

¹ Dion. Halic.
II. 14.

Here I would recommend the Reading of the Vatican MS, ἀνεπίληπτον,
*i. e. irreprehensibilem. Patres apud Majores nostros tenere non potuerunt, ut
Reprehensores essent Comitiorum*², *Reprehendere* is to revoke or disannul,
irritum facere, So the same *Cicero*³, *Majores de singulis Magistratibus bis
vos sententiam ferre voluerunt* ————— *ut esset reprehendendi potestas, si*
populum beneficii sui poeniteret.

² Cic. pro
Planc. § 3.
³ II. Agrar.
§ 11.

For the Roman Constitution, in the great article of Legislation, may
not improperly be compared to the Condition of Guardian and Minor in
the Roman Law; where the Property, the Free-hold, the Dominium, was
in the Minor, but no Act of his could be good, unless confirmed by the
Authority of the Guardian. Thus the *Imperium* or *Majestas* was pro-
perly in the People (looking upon this System of Government as purely
Democratical) yet the *Auctoritas* was as properly in the Senate.

*Decreverunt, ut cum Populus Regem jussisset, id sic ratum esset, si
Patres Auctores fierent*⁴.

⁴ Liv. I. 17.

*Tantus autem Consensus est Municipiorum, Coloniarumque Provinciae
Galliae, ut omnes ad Auctoritatem hujus Ordinis, Majestatemque
P. R. defendendam conspirasse videantur*⁵.

⁵ Cic III. Phi-
lip. § 5.

*Nam ita se Res habet, ut si Senatus Dominus sit consilii publici, quod-
que is creverit, defendant omnes, et si ordines reliqui principis Or-
dinis consilio Remp. gubernari velint, possit ex temperatione Juris,
cum Potestas in Populo, Auctoritas in Senatu sit, teneri ille mode-
ratus et concors Civitatis status*⁶.

⁶ Cic III. de
Legg. § 12.

* Plebi vero haec tria concessit, magistratus creare, leges sancire, et de bello decernere, quoties
Rex permisset; ita tamen, ut ne horum quidem absolutam haberet potestatem, nisi idem Senatui
visum fuisset.

And this is the exact Notion of AVCTORITAS among the Romans: not what We mean by *Authority*, Power or Command, but a *Ratification*, the Concurrence of those, whose Consent is necessary to make the Acts of others good in Law.

So in the Comedy,

³ Ter. Adelph.
IV. 5. 37.

Auctor *his rebus quis est*?

Something more of this below.

It is not to be imagined, but that many Years of the Republic passing over in a constant struggle for Power between the Patricians and Plebeians, between the Supporters of an Aristocratical, and those of a more popular Administration, would vary the Scene and Circumstances of this Disposition. And accordingly We find it. At one time the Conclusions of the People were carried to the Senate for their Ratification. So *Servius*⁶, *Transfert in Trojanos Romanam consuetudinem — Prius enim jubebat aliquid Populus, postea confirmabat Senatus*. At another, the Senate did not determine upon the Decrees of the People, but the People upon the Decrees of the Senate. So *Dionys. Halic*⁷. What passed a Majority of the *Curiae*, ἐπὶ τὴν Βελὴν ἀνεφέρετο. Εφ' ἡμῶν δὲ μετὰ καὶ τὸ ἔθνος. Οὐ γὰρ ἡ Βελὴ διαγιγνώσκει τὰ ψηφισθέντα ὑπὸ τῆς Δήμου, τῶν δ' ὑπὸ τῆς Βελῆς γνωσθέντων ὁ Δῆμος ἐστὶ κύριος*.

⁶ ad Virg. IX.
Aen. 192.

⁷ II. 14.

A great Instance of the Reduction of the Senate was under *Servius Tullius*, who, being chose King by the Suffrage of the People and the Senate refusing to ratify (ἐπικυρῶσαι) the Election, set at nought their Authority, and shew'd He could govern without them.

Again, when the *Tributa Comitia* were established, the *SCtum*, as We have seen in the last Section, had no weight whatever in these Councils. It was left the Senators *Auctores esse tantum Centuriatorum et Curiatorum Comitiorum*.

⁸ Liv. VI. extrem.
⁹ I. Observ.
25.

Their Power was also shaken, when the Senate refusing to lend their *Authority*, a Secession ensued, and Reconciliation procured upon these Terms: *Vt Patres Auctores omnibus ejus anni Comitibus fierent*⁸: Which, as *Gronovius*⁹ rightly observes, was a tacit acknowledgment of the People, that their Decrees would not be binding without the Concurrence of the Senate.

A.V.C. 415. 2. *Publius Philo*, the Dictator, proposed and carried a Law in which it was enacted, that of those Laws, which should hereafter be concluded upon at a *Comitia* of the *Centuries*, *Patres ante initum suffra-*

* — ad Senatum referebatur. Apud nos autem mos iste mutatur. Non enim Senatus statuit de Placitis Populi, sed eorum quae Senatui placent, Populus est Dominus.

gium *Auctores fierent* ¹. Which may possibly be the Period, that *Dionys.* ¹ Liv. VIII. *Halic.* alludes to, in the Place last cited. This Law was afterwards enforced by the *Lex Moenia*, sometime about *A. V. C.* 445. according to *Gronovius* ².

When their Power was ~~thus~~ reduced, some procured Laws to be passed without them: and some more violent Spirits would add a clause to compel their Concurrence. So *Apuleius Saturninus* proposed in his Bill, that, if the People should pass it into a Law, every Senator should be compell'd by Oath, within five Days to concur with it under very severe Penalties ³. So *C. Cornelius*, a Tribune, *A.* 687. *promulgavit legem qua auctoritatem Senatus minuebat* ⁴, viz. Μη ἐξέν τι τοῖς Βαλευθαῖς μηδέν τῶν τῷ Δήμῳ προσηκόντων φημιζέσθαι ⁵ * : and afterwards added a Clause, that the Senate should be obliged to pass it.

Sylla and *Pompey* were for restoring to the Senate their ancient Powers, but without effect: and, being no Friends to the Populace, for abolishing also the *Comitia* by *Tribes*, and recovering those by *Centuries*.

Εἰσηγῆντο μηδέν εἶ ἀπροβέβλητον εἰς τὸν Δῆμον εἰσφέρεισθαι· νενομισμένον ἔτω καὶ πάλαι, παραλελυμένον δὲ ἐκ πολλῶν καὶ τὰς χειρονομίας μὴ κατὰ ΦΥΛΑΣ, ἀλλὰ κατὰ ΛΟΧΟΥΣ, ὡς Τέλλου Βασιλεὺς ἔταξε, γίνεσθαι ⁶. †

My Reader, in the short View which I have sketched out of the Revolutions between Senate and People, will not forget to take along with him, that possibly every Instance of the Diminution of the Senatorial Authority might not regard the matter of Legislation (nay We are certain, that some of them do not) but that of their Elections: which, as I have more than once inculcated, were the Subject of these Assemblies also.

But these Considerations lead me to speak to an Expedient, which the Senate would often practise under these unfavourable Circumstances; and to illustrate a passage or two relative to this very Question in *Livy*, which have not been generally well understood.

Patres ita gratiam ineunt, summa Potestate Populo permissa, ut non plus darent Juris quam retinerent. Deceverunt enim, ut cum Populus regem jussisset, id sic ratum esset, si Patres Auctores fierent: hodieque in Legibus Magistratibusque rogandis usurpatur idem Jus, Vi adempta. Priusquam Populus suffragium ineat, in incertum Comitiorum eventum Patres Auctores fiunt ⁷.

Usurpare Jus, Vi adempta ⁸ is to claim or make shew of a Right, though We are restrained or denied the proper Execution and Fruit of it: *solen-*

* Ne Senatoribus liceret, ullam rem quae ad populum pertineret, decernere.

† Legem etiam tulerunt, ut nulla postea Rogatio apud plebem fieret Senatu inconsulto, revocantes veterem morem, sed dudum antiquatum. Postulabant etiam Comitia non Tributa, sed Centuriata haberi ex instituto Servii Tullii.

nibus quibusdam peractis, testari Jus, etsi uti ea, idque exsequi prohibearis. It is usual to claim a Title, without the *effective* Exercise of it, in order to prevent Non Usage. *Vsurpatio* therefore in *Livy* is, what *Tacitus* calls the Image of Power, whereas *Vis* is the Power itself.

Tiberius vim Principatus sibi firmans imaginem Antiquitatis Senatui praebebat ⁴.

⁴ Tacit. III.

Annal. 60.

⁵ II. Agrar.

§ 12.

So *Tully* ⁵ (as We have seen upon another occasion) distinguishes between the *Vera Comitia Curiata*, and those *ad speciem atque ad usurpationem Vetus- tatis adumbrata*. *Vsurpatio est Vsupcaptionis Interruptio*. Πῆξις τῆ χειρὸς, as the Greek Lawyers express it, when an Act is done to prevent Pre- scription ⁶. Thus, *si Mulier trinoctium usurpandi causa abesset*, it would defeat the Husband's Right who claimed *ex usu*.

⁶ See D. 41.

3. 2.

Gell. III. 2.

Tum e seditiosis unum vinciri jubet, magis usurpandi juris, quam quia unius culpa foret ⁷.

⁷ Tacit. IV.

Hist. 25.

Again, by *incertum Comitiorum Eventum*, in the foregoing Passage of *Livy*, may possibly be understood, that the Senate would frequently pass a Vote in their Council (before they knew which way the People would Vote) "That, Whatever the People should conclude, should be esteemed Firm and Valid."

Consules comparare inter se Italiam et Macedoniam aut fortiri placuit: priusquam id Sors cerneret, in incertum, nequid gratia momenti faceret, in utramque Provinciam quod res desideraret, supplementi decerni ⁸.

⁸ Liv. XLIII.

12.

The Senate therefore, *usurpandi Juris causa*, would frequently by their Decrees enact the same Laws, as the People did at their *Comitia*. Whence frequently the same Disposition of Law is sometimes said by the Ancients to proceed *ex Plebiscito*, at other times, *ex SCto*.

AND YET We must not imagine, that this is the compleat Notion of *SCtum*, and that the Decrees of this Body were nothing else but Ratifications of the Acts of the People. There were some branches of Power within the proper Department of the Senate, which the other Part of the People never disputed, As the Care of the *Exchequer* and the *public Money* — of *Embassys* — *Prorogationes Imperii et Provinciarum* — *Indictio Feriarum et Supplicationum*, etc. So likewise, *trepidante Rep.* the Consul had sometimes an unlimited Authority, in virtue of a Decree of Senate, to provide for the public security, by Measures unappealable and uncontrollable.

Extremum atque ultimum SCtum, quo, nisi pene in ipso Urbis incendio, atque in desperatione omnium salutis, nunquam antea discessum est —

"Dent operam Consules, — nequid Resp. Detrimenti capiat" ⁹.

This was called *SCtum ultimae necessitatis*

⁹ Caesar. I. B.

Civ. 5.

Cic. I. Catil. 2.

And

And hence We are with reason led to attribute the notion of *SCtum*, to these Resolutions of the Senate also: to these Acts of their indisputable Jurisdiction, as well as to those Instances of their Interposition in the public Laws of the Country, which I have been considering above¹. ³ Polyb. VI. 12. And indeed most of the few *SCta* in this Period, of which We have any knowledge, are pretty much of this strain. The *SCta* had more of Law in them, after the Republic than before, as We shall see, and the reason of it also, in the place where I promised to consider this Difference. What We have before, are rather like Acts of Magistrates, than Legislators, like Edicts or Proclamations to invigorate the Execution of Law, and to guard the public Peace. *Dent operam Consules*, etc. Thus, D.E.R.I.C. (*i. e. de ea re ita censuerunt*) *ut M. Pomponius Praetor animadverteret curaretque*⁴. And it is not unlikely, that these are what some Writers have agreed to call by the Name of SENATVS-CONSVLTA PRIVATA.

Others again seem to distinguish between *Senatus Consulta* and *Senatus Decreta*⁵; from whence some might be willing, that these two Acts of Senate, which I am now upon, should be distinguished by these two Denominations. But this, I apprehend, without any Reason or Authority.

I cannot conclude this Section, without considering, what this last Observation of *Senatus Consulta*, and *Decreta* leads me to, *viz.* What is meant by a third Appellation, *Senatus Auctoritas*, which was neither of the two former, supposing them to be distinct. It seems to be what *Tacitus*⁶ calls *Consensus Senatus*, though *Dion Cassius* tells us, it was impossible to translate it. It was an imperfect *SCtum*: imperfect, not for any want of Form or Authority in the Senate that composed it; but such as lost all its executive force, by the Negative of the Tribune, or any other Concurrence, which might defeat its Activity⁷.

CICERO ATTICO SAL.

*Litterae mihi a Quinto fratre cum SCto, quod de me est factum, allatae sunt. Mihi in animo est legum lationem expectare; et, si obrectabitur, utar Auctoritate Senatus, et potius Vita, quam Patria carebo. Tu, quaeſo, festina ad nos venire*⁸.

Upon the whole. The *SCta* of the Romans, as far as We are concerned in the Inquiry, are of three sorts.

1. Orders, Votes or Resolutions of that Body in Affairs which belonged to their particular Consideration.
2. Such Acts of the Senate, as tended to ratify and confirm the Acts of the People.
3. Under the new Period of the Roman Emperors, when the *Comitia* were translated *e Campo ad Patres*, as the Writers of that Country express themselves, They were the only Remains of Legislation (such as it was) that the Emperor had left in the hand of his Subjects.

D d

PRAETORS

⁴ Gell. XV. 11.
Sueton. de
Clar. Rhet.
C. 1.

⁵ Aelius Gal-
lus apud Fest.
pag. 496.

⁶ XIII. Annal.
26. XIV. 49.

⁷ Dion Cassius
XLII. 23. LV.
3. and the
notes of the
last very valu-
able Edition.
Cic. III. de
Orat. 2.
I. Fam. 2.
VIII. 8.

Not. ad Liv.
IV. 57. X. 22.
⁸ Cic. III. ad
Attic. 26.

PRAETORS' EDICTS.

- A**NOTHER Source of Roman Law was the Praetors' Edicts, sometimes called *ab Honore Judicis*, *IVS HONORARIUM*¹. *Quia Auctores ejus Honores, i. e. Magistratus, gerebant*². For according to Aristotle³, *Τίμας λέγομεν εἶναι τὰ Ἀρχάς*. *
- Verbaque honoratus libera Praetor habet*⁴.
- So Cato calls that *Vinum Honorarium, quod Legatis in Provinciis dabatur*.
- The Name of Praetor seems formerly to have been given to all Magistrates of the first Dignity, viz. a *Praeundo*. For instance: The
- Regio Imperio duo sunt: iique PRAEUVND, judicando, consulendo, Praetores, Judices, Consules appellantur*⁵.
- Consules Praetores dictos, quod praeirent Populo*⁶.
- Est hoc nomen [Praetoris] quasi Jure patrio Romani Imperii proprium, et ante ipsos etiam Cos. in ampla Romanorum Rep. usui habitum*⁷.
- His temporibus nondum Consulem Judicem, sed Praetorem appellari mos fuerit*⁸.

In like manner, whoever had the supreme Command in the Field was called Praetor for the same reason.

- Forte sub hoc tempus Castellum evertere Praetor Nescio quod cupiens*⁹.
- Veteres omnem Magistratum, cui pareret Exercitus, Praetorem appellarunt. Vnde et Praetorium Tabernaculum ejus dicitur, et in castris Porta Praetoria et hodie quoque Praefectus Praetorio*¹.
- Praetoria Porta in castris dicitur, qua exercitus in praelium educitur, quia initio Praetores erant, qui nunc Consules, et ii bella administrabant*².
- Thus when Cicero writes³, *Epaminondas, Thebanorum Imperator, ei, qui sibi ex lege Praetor successerat, exercitum non tradidit etc.*, Marius Victorinus⁴ thus comments upon the Place, *Notare debemus, omnes Magistratus et Praetores Imperatores appellatos, ut hic, "Quod Epaminondas, Thebanorum Imperator, ei, qui sibi ex lege Praetor successerat," cum Imperatori succedere debeat Imperator*. So *Imperator*⁵ and *Praetor*⁶ are used promiscuously for a General, by Nepos.
- * *Magistratus enim Honores esse dicimus.*

Upon this Account, in the Life of *Miltiades* by that Author⁷, *Domi*⁷ c. 4. *autem creati decem Praetores*, I can easily part with the Gloss, which follows, *qui exercitui praeessent*. As *Varro* has it, *Praetor dictus, qui praeiret Jure et Exercitu*: and again, *In re militari Praetor dictus, qui praeiret exercitui*⁸. From such Funds as these the Annotator or Gloss-⁸ IV. de L.L. 14. 16. Man raised his marginal Observation.

And it may be worth remarking, that this Officer by the Greek Writers upon Roman Affairs⁹ is always called *Στρατηγός*, though his Administration was purely Civil and Juridical.

The Office of Praetor was erected A. V. C. 387. not for the reason assigned by *Pomponius*¹, *Cum Coss. avocarentur bellis finitimis, neque esset qui in Civitate jus reddere posset, factum est, ut Praetor quoque crearetur, qui Vrbanus appellatus est, quod in Vrbe jus redderet*; though that was the Pretext. But it really was *redhostimenti loco*, a sort of Reprizal upon the Commons, who had now so far prevailed as to be represented by one Consul. The Patricians therefore got the Jurisdiction, the *Forense Munus*, of the Consul, transfer'd upon a new Officer, instituted for that purpose, and taken out of their own Body, whom they called a Praetor². However He was not long confined to the Patricians. For A. 416. *2*. *Publius Philo* was taken from the Plebeians³.

About the first Punic War, and the Year 511, a second Praetor was added, called *Praetor Peregrinus*, or, *inter Peregrinos*⁴. Whose Jurisdiction was exerted, if the Parties in Suit were both Aliens, or if the Defendant only, because *Aetor sequitur Forum Rei*. And so *Seneca*⁵, *An ille plus praestat, qui inter Peregrinos et Cives, aut Vrbanus Praetor*—

—PRAETOR QVI INTER PEREGRINOS

ET CIVES IVS DICIT⁶. —

—PR. INTER CIVES ET PEREGRINOS⁷. —

—PR. QVEI INTER PEREGRINOS IOVS DEICET IS IN DIEBUS X. PROXVM. QVIBVS H. L. POPVLVS PLEBSVE IOVSERIT FACITO VTEI⁸. —

The Praetor *Peregrinus* was copyed from the Athenians, who had just such an Officer, and, what is remarkable, was called by them *Πολέμαρχος*⁹.

It sometimes happen'd at Rome, that the same Person enjoyed both Offices together.

*Praetores Provincias sortiti sunt. P. Cornelius Sylla Vrbanam et Peregrinam, quae duorum ante Sors fuerat*¹.

Other Instances may be seen in the same Author. *Aemilius*, the Praetor *Peregrinus*, delegated his Office to *Atilius*, the Praetor *Vrbanus*². C. *Hostilius*, upon a particular Occasion had the *Praetura Peregrina* added to his *Vrbana*³. And C. *Decimus*, the Praetor *Vrbanus*, dying in his Office,⁴ *P. Cornelius*, his Colleague, was substituted in his Room⁴. Thus in a *SCtum* preserved in *Gruter*⁵.

PRAETORS' EDICTS.

ΣΤΡΑΤΗΓΟΥ ΚΑΤΑ ΠΟΛΙΝ ΚΑΙ ΕΠΙ ΤΩΝ
ΞΕΝΩΝ ΛΕΥΚΙΟΥ ΚΟΡΝΕΛΙΟΥ
CICENNA.

This *L. Cornelius Sifenna* was Praetor in the Consulate of *M. Aemilius Lepidus*, and *Q. Lutatius Catulus*, as the Inscription shews, *A.V.C.* 675. He is supposed to be that obscene Writer, mentioned by *Ovid*, that translated the *Milefiaca* of *Aristides* into Latin ⁴.

I shall not trace the Progress of this Office, to see by what steps the Number of Praetors encreased at last to Sixteen, and upwards. My Reader may consult upon that Head, the Authors here cited ⁵ as much in order as possible.

⁵D. 1. 2. 2. 32.
Liv. XXII.
30. XXXII.
27.
Dion Cassius
XLII. 51.
LVI. 25.
XLIII. 47.
LX. 10.
LVIII. 20.
LIX. 20.
XLIII. 49. 51.
LVI. 25.
LX. 10.

⁶D. 1. 2. 2. 32.

They were sometimes created for particular Branches of Jurisdiction. The Emperor *Claudius* added two Praetors for *Fidei-Commisssa*, or the Cognizance of Trusts ⁶.

P. COELIO P. F.
SFR. BALBINO
VIBVLLIO PIO
X VIRO STILITIB. IVDIC.
VI. VIRO EQVIT. ROMAN.
TVRM. QVINT. TR. MIL. LEG.
XXII. PRIMIG. P. F. ADLECTO
INTER PATRIC. AB IMP. CAES.
TRAIANO HADRIANO AVG.
SALIO COLLINO QVAEST.
AVG. FLAMINI VLPiani PR. DE
FIDEI COMISS. COS.
DESIGNATO
DECVRIONES SVA PECVNIA ⁷.

⁷ Gruter.
CCCXCIII.
6.

⁸D. 1. 2. 2. 32.

⁹ Capitolin. in
vita, § 10.

¹D. 27. 1. 6.
13.

Nerva added a Praetor *Fiscalis* ⁸. *M. Antoninus*, a Praetor *Tutelar* ⁹. Upon whose Office *Vlpian* the Lawyer drew up a Discourse ¹. I find him in Inscriptions, where he is called both TVTELARIS and TVTELARIVS.

L. ARADIO VAL. PROCVLO V. C.
AVGVRI
PONTIFICI MAIORI
QVINDECENVIRO SACRIS FACIVNDIS
PONTIFICI FLAVIALI
PRAETORI TVTELARI

² Gruter.
CCCLXI. 1.

etc. ²

L. ARA-

PRAETORS' EDICTS.

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L. ARADIO VALERIO PROCVLO V. C.
AVGVRI PONTIFICI MAIORI XV. VIR. SAC.
FACIVNDIS PONTIF. FLABIALI PRAETORI
TVTELARIO LEGATO PRO PRAETORE PROV.
NVMIDIAE etc.³

³ CDLXIII.
2.

C. SALLIO ARISTAENETO C. V.
SEPTEMVRO EPVLONVM
SODALI AVGVSTALI IVRIDICO
PER PICENVN ET APVLIAM
CVRATORI VIARVM AVRELIAE
CORNELIAE TRIVMPHALIS
PRAETORI K. TVTELARIO QVAESTORI
DESIGNATO etc.⁴

⁴ CDLXV.
5.

And if any such appear, which I dispute not but they may, before the Dates which I have assigned them, it will be found, that they were by a particular Commission, and only a temporary Establishment.

But to return to our Officer. He had not what is called *Imperium merum*, but *mixtum*. He had not the *Jus Gladii*, did not judge in Criminal Cases, but in Civil only. The *Imperium Merum*, the Power of Life and Death, was in the People⁵. This Authority rested first in the Kings of Rome, as appears from *Livy*⁶. At the extinction of that Dignity, it was transfer'd to the Consul, till the People assumed it by the *Lex Valeria*; who then, as Emergencies arose, delegated their Authority to an extraordinary and temporary Officer, called *Quaestor Parricidii*. For that was his general Name whatever the particular Offence might be⁷.

⁵ D. 1. 2. 2. 23.
⁶ I. 48.
⁷ D. 1. 2. 2. 16. and 23.

The *Imperium mixtum* is that kind of Power which goes along with all Jurisdiction, as necessary to support it, and punish the Contumacy of those, who are not willing to yield to the Authority of it⁸.

If some of these additional Praetors appear to be engaged in Criminal Proceffes,

⁸ Vinnius de Jurisdictione, Eek. ad Dig. Lib. II. Tit. 1.

*Gaium Antonium, qui multos in Achaia spoliaverat—Graeci—eduxerunt—in jus ad M. Lucullum Praetorem, qui jus inter Peregrinos dicebat—cum Lucullus id quod Graeci postulabant, decrevisset*⁹.

⁹ Afcon. ad Orat. Cic. in Toga Candida.

Yet the original Praetor, whom We are chiefly concerned about, who is called *Praetor Primus, Major, Maximus*, was always confined to his proper Jurisdiction: which, it must be observed, was more of Equity than Common Law Proceeding.

*Jus Praetorium adjuvandi vel supplendi vel corrigendi Juris Civilis gratia, propter utilitatem publicam, introductum*¹.

¹ D. 1. 1. 7. 1.
For.

- For which reason this Branch of Roman Law was not reckoned as
- D. 1. 1. 7. Part of the *Jus Civile scriptum*, by *Papinian*⁶, but stands in opposition to it. And thus as We distinguish between Common Law and Equity, there were with that People *Actiones Civiles et Praetoriae*⁷, and *Obligationes Civiles et Praetoriae*⁸. The Praetor was therefore called *Custos, non Conditor Juris*—*Judicia exercere potuit. Jus facere non potuit*—*Dicendi, non condendi Juris potestatem habuit*—*Juvare, Supplere, Interpretari, Mitigare Jus Civile potuit*⁹: *Mutare vel Tollere non potuit*¹.
- ² D. 1. 1. 7. 1. For instance: *Heredem facere non potuit*². For *Heres* is *Dominus*³.
¹ D. 6. 2. 12. 4. And nothing but Law could give Dominion. But his Power so far extended, *ut qui Jure Civili Heredes esse nullo modo potuerunt, Jure tamen Praetorio fieri possent* Bonorum possesores.

Hence it is observed, that *Tribonian* was cautious in his Expression, *non modicam obtinent Juris auctoritatem*. The Praetorian Edicts are not properly Law, though they may operate like Law. And even here⁴ some Civilians adhere to another Reading, which is also that of the older MSS.

Praetorum quoque Edictum non modicam obtinet Juris auctoritatem: meaning the Perpetual Edict, composed by order of the Emperor *Hadrian*, which made a great Part of the Roman Law.

And indeed the Perpetual Edict itself came to be Law, not *ab Honore Magistratum*, from whom it derived its Being, but *a Constitutione Principis*, from whom it derived its Authority: more especially from the Sanction of *Justinian*, who gave the force of Law to his *Corpus*: a Compilation which owes much to that Edict, and the Interpretation of Lawyers upon it.

⁵ Cic. II. de Fin. 22.

⁶ Cujac. VII. Observ. 29.

⁷ D. 2. 1. 3.

⁸ 2. 13. 1. 3.

D. Lib. 50.

Tit. 3.

Raevard. Protrib. Cap. 4.

Cujac. VIII.

Observ. 15.

Salmaf. de Modo Usurar.

C. 15.

Sueton. in.

Claud § 16.

in Domitian.

Senec. III. de

Benef. 7.

Deuteronom.

XXVII. 1.-3.

⁹ II. Verrin.

42.

⁹ Otto ad

Instit. pag 42.

The Praetorian Edicts were certain Rules or Forms, published by the Praetor, at the beginning of his Office, and signifying the method by which He bound himself to administer Justice that Year.

*Cum Magistratum inieris, et in Concionem ascenderis, est Tibi edicendum, quae sis observaturus in Jure dicendo*⁵.

This Form was commonly exhibited in public⁶ upon a *Tabula dealbata*, or *gypsata*, in Greek *Λεύκωμα*, which *Suidas* thus interprets: *Τοῖχος γύψω ἀληθιμμένος, πρὸς γραφὴν πολιτικῶν πραγμάτων ἐπιτήδαιος*^{*}, and was therefore called *ALBUM PRAETORIS*, or *IVDICVM*⁷.

These Edicts lasted only one Year, the Date of the Magistrate's Office; and are therefore by *Cicero* called *Leges Annuae*⁸. But as some of them for their singular Equity and Utility, would be confirmed or revived by the Successor, such were called *Edicta Translatitia*, and were carried into the Provinces to serve for Law there also⁹.

* *Paries gypso illitus, cui Res Civiles apte inscribi possunt.*

It was not to be wonder'd, if corrupt Praetors should sometimes be found, who in the plenitude of Power would abuse their Jurisdiction, and alter not only the Channel of received Law, but even that which their own Edicts had directed. Of this We have many notable Instances in the *Verrinae* of *Cicero*, and *Dion Cassius* has left us his Testimony to the same purpose¹. It was then that *C. Cornelius Trib. Pl.* of whom We have had occasion to speak before (not *Cornelius Sylla*, the Dictator, as some have imagined) proposed a Law, *ut Praetores ab Edictis perpetuis jus dicerent*², whereby a Stop was put to these Proceedings³. Perpetual, not everlasting, but uninterrupted, and invariable during their Magistracy. As *Ovid*, who had connected a String of Stories from the beginning of the World down to his own time, writes in the beginning of that Performance:

*Ad mea perpetuum deducite tempora carmen*⁴.

*Namque ab eo perpetua diffensit vita*⁵.

*Neque minus concinnus in brevitae respondendi, quam in perpetua oratione ornatus*⁶.

So *Caesar* has *Trabes Perpetuae*⁷, Solid Timber, not pieced: *Paulus perpetua*⁸. And *Livy*, *Perpetui Montes* a continued Ridge of Hills.

Thus the *Jus Praetorium*, made up of these Edicts, gained a Consistency, was commented upon among others, by *Servius Sulpicius*, and *A. Ofilius*, who lived at the same time with *Cicero*, and was raised to that Repute, that the Study of the Civil Law was no longer begun from the Study of the XII. Tables, but the Perpetual Edict⁹.

The Perpetual Edict of *Hadrian*, composed by *Salvius Julianus*, A. 834¹, was another thing. It was digested from the *Jus Praetorium*, and designed for a *Corpus Juris Civilis*. It is therefore called *Lex* and *Jus Perpetuum*², and the Praetor in that Sense came to be called *Νομοθετης*³. This Edict was commented upon by *Caius Furius Anthianus*, *Pomponius*, *Callistratus*, *Vlpian*, *Paulus*, etc. The Fragments of it have been searched for, and reduced into a tolerable Order by *Gul. Ranchinus*, *Otto*, *Noodt*, but more particularly by *Jac. Gothofredus* in his *Series Edicti Perpetui*⁴.

It is not to be understood, as if no Magistrate had his Edict, but the Praetor. These last upon account of their Frequency and Distinction, and as they regarded much the Disposition of general Law, are always understood by *Jus Honorarium*, if nothing be expressed to restrain or distinguish them. But We read of Consuls' Edicts also, of Censors', Quaestors', Tribunes' of the People, Priests', Proconsuls', Dictators', and in a word, of all that exercised Jurisdiction⁵. And now, as I promised, a Word or two of Edicts of the Aediles.

*Proponebant et Aediles Curules Edictum de quibusdam causis, quod et ipsum Juris Honorarii portio est*⁷.

¹ XXXVI. 23.
² *Dion Cassius*
ibid.

Ascon. ad
fragm. Cicero
pro Cornelio.
³ *Pigh. Annal.*
ad A. 387.
Spanheim.
Orb. Rom.

c. 8.
⁴ *I. Metam. 4.*
⁵ *Nep. in Ca-*
tone, c. 1.

⁶ *Id. in Epa-*
min. c. 5.
⁷ *VII. B. Gall.*

23.
⁸ *Ibid. 57.*

⁹ *Cic. l. de*
Legg. 6.

Perizon. ad
L. Vocon.

pag. 193.
¹ *C. l. 17. 2. 8.*

Euseb. in
Chronic. l. 2.

Eutrop. VIII.
9.

Bertrand. in
vit. Juliani.

Gul. Grotius,
ibid.

Menag. A-
moenit. J. C.

c. 34.
Schminckii

Praef. Syn-
tagm. Crit.

² *D. 38. 8. 1. 2.*
³ *19. 1. 42.*

C. 7. 62. 5.
³ *Nov. 24. —*

25.
⁴ *Gothofr.*

Quatuor
Fontes Juris

Civilis.
Idlinga. Var.

Jur. Civ.
Capp. 3. et 4.

Add. Van
Leeuwen.

Fragm. Vett.
ICtorum,

and the Am-
sterdam Edit.

of the Corpus
Juris Civilis.

⁵ *Above pag.*
182.

⁶ *Sueton. Jur.*
§ 20. and 49.

Euge
J. 1. 2. 7.

⁹ Plaut. Cap-
tiv. IV. 2.43.

¹ Varro de
L. L.

Cic. VII.

Verrin. 14.

² Cujac. VIII.

Observ. 38.

Paul. Recept.

Sentent. I. 15.

2.

³ Juven. X.

Sat. 102.

⁴ Perf. I. Sat.

130.

Euge Edictiones Aedilitias habet ⁹.

The Aedile had Cognizance *de omnibus rebus Promercalibus* ¹, had a Concurrency with the Praetor ², who commonly remitted the more minute Affairs to his Inspection, such as the Market, the Aquaeducts, Common Sewers, Shews, Roads, Streets, Buildings, Nuisances, Stews, Brothels, Weights and Measures, etc.

*Et de mensura Jus dicere, vasa minora
Frangere pannosus vacuis Aedilis Vlubris* ³.

*Italo quod honore supinus
Fregerit Heminas Areti Aedilis iniquas* ⁴.

Ageable to this Practice, the Forger of the *Acta Diurna* has this article of News,

TITINIUS AED. PLEBIS MULCTAVIT LANIOS.

⁵ Inscript.
pag. 274.

And, in conformity to an old Custom of representing the Office of the Deceased upon his Monument, *Fabretti* ⁵ has given us the funeral Inscription of one of these Officers,

T. VETTIVS L. F.

POL. AEDILIS.

VETTIA. T. F. SECVNDA

VXOR FECIT.

with the Figure of a Bushel and the Gaging Instrument, represented at the bottom of it.

So *Homer*,

⁶ A. Odyss. 77.

Ταῦτα τέ μοι τελέσαι, πῆξαι, τ' ἐπὶ τύμβῳ ἐρεβμὸν,
τῷ καὶ ζῶος ἔρεσσον, ἐὼν μετ' ἐμοῖς ἐτάροισιν ⁶.

*Haec mihi perfice, figeque super sepulchrum remum,
Quo etiam vivus remigabam, cum essem cum meis sociis.*

⁷ pag. 182.

⁸ de R. R.

⁹ I. de Orat.

58.

See Varro de

R. R. II. 3.

¹ See Mag. IV.

Miscell. 3.

² Add. D. 9. 2.

27. 28.

Pollet. For.

Rom. III. 2.

Briffon. de

Ferm. III.

pag. 289.

These Edicts of the Aediles were much of the same Nature with the *Leges Censoriae*, which We have considered above ⁷, namely *Precepts*, or *Injunctions* of their Office. And to these I would refer the *Lex Oleae vendendae* mentioned by *Cato* ⁸, and the *Manilianae venalium vendendorum Leges* by *Cicero* ⁹, possibly the *Affize* of Provisions. Though Others are of a different mind, whose Judgment I am not inclined to dispute ¹.

Some large Remains of the Aedilitian Edicts are preserved to us in the Digests, by the means of *Julian*, who incorporated them into his Perpetual Edict. See the Title *De Aedilitio Edicto. Dig. Lib. XXI. Tit. 1. ll. 1. 38. 40. 41. 42.* ²

RESPONSA.

RESPONSA PRVDENTVM.

Deckberus de Prudentibus, eorumque Responfis.

Raevardus de Auctoritate Prudentum.

Menag. Amoenit. J. C. Cap. II.

The Commentators upon

J. 1. 2. 8.

D. 1. 2. 2. 12.

D. 1. 2. 2. 47.

THE Account in the Law-Books here again is deficient : We ought to have been acquainted, how these stood *sub libera Rep.* and how *sub Imperatoribus*.

In the first Period they were little more than OPINIONS OF LAWYERS, upon Questions of Law. No Judge was tied down to their Decisions :

*ICtorum Responfa et Decreta saepe ab Oratoribus dicendo evertuntur*¹.

Their Responses were not under Seal : and this Privilege lay open to as many as liked it.

Augustus introduced a new Practice. By his Appointment particular Lawyers were selected for this purpose, and established by his Patent or Authority. By which means He greatly reduced the Number, gave a great Credit to the Profession, and ordered that their Opinions should be Law in the Courts of Justice².

The Origin of these was the Distinction of the Roman Citizens into Patricians and Plebeians. Exactly in the same manner, as the Athenian *Εὐταλπίδας*, or those of a better Rank, were the Guardians and Protectors of the lower sort, and had it in Charge, among other Things, *νόμους καὶ τὰ δίκαια ἐξηγεῖσθαι**, and to manage their civil Concerns³ : so here also, the Patricians having all the Knowledge of the Constitution, were to take care of the People's Rights and private Interests, to give them their Advice and Protection *gratis*, and were therefore called PATRONI. The Others again owed them reciprocal Services, as, to redeem them from Captivity, to portion their Daughters, *etc.* and were called CLIENTS⁴. And hence the Duty which a Client owed his Patron, was next to the filial Duty, which was owing from Children to their Parents⁵.

And not only private People, but even Colleges and Companies, and foreign Cities had their Patrons, *i. e.* Agents, to manage and negotiate for them.

¹ Cic. pro Muren. 13. pro Caecin. 24.

² D. 1. 2. 2. 47. Heinecc. Antiqq. Rom. I. 2. 38. seq.

³ Dion. Halic. II. 10. Plutarch. in Theseo. Petit. LL. Attic Lib. II. Tit. III.

⁴ Dion. Halic. II. 9. Plutarch. in Romulo.

⁵ Gell. V. 13.

* *Leges et jura interpretari.*

M. IVNIVS
SABINVS
IIIIVir. AEDILICIAE POTEST.
E LEGE IVLIA MVNICIPALI
PATRONVS
COLLEGI CENTONARIORVM

etc.⁶.

⁶ Fabrett.
p. 485.

⁷ Reines. I.
283.

⁸ Id. II. 17.

⁹ I. 33.

¹ VI. 123.

So We read of

PATRONVS COLLEG. DENDROPHORORVM⁷.
FABRORVM⁸.
LENVNCVLORVM⁹.

NEGOTIATORES OLEARI EX BAETICA PATRONO¹.

In Process of Time, what was originally meant for a Duty, became a Trade or Profession. For as these were, in a manner, the only Lawyers, they served others, besides their own immediate Dependants, and took pay for their Advice: and this gave occasion afterwards to the *Lex Cincia*, viz. to moderate and restrain unreasonable Fees for Council.

Their Business principally arose from the Obscurity of the XII. Tabb. which called for the help of understanding Men, or the *Disputatio Fori*². So that they seem to amount to what We call Precedents or Reports, *Res Judicatae*, *Receptum Jus*, *Jus post multas variationes receptum*, etc. And to this Practice we probably owe, in great measure, that most excellent Collection, which makes the last Title in the Pandects, *De Regulis Juris*.

As these passed for Law chiefly and principally by Acquiescence, in this respect they come near to Custom, and are therefore properly called *Jus quod sine scripto venit*³. Yet it is held to be *Pars Juris scripti*, and as such is ranked by the Emperor, and others, (as We have seen at the Head of *Populiscitum*⁴) who have enumerated the Branches of the Roman-written Law.

² D. 1. 2. 2. 5.

⁴ Above pag.
177.

*Verbum ex Legibus sic accipiendum est, tam ex legum sententia, quam ex verbis*⁵.

⁵ D. 50. 16. 6.
1.

It is also called more emphatically *Jus Civile*, the Genus, of which it is a Species⁶.

⁶ D. 1. 2. 2. 5.
and 12. Above
pag. 145.

From the Opinion which the People conceived of their Abilities, and from their Acquiescence in these Determinations, it was, that the Roman Law found a considerable Addition, by their explaining, illustrating, and supplying the old Law; and that We frequently read in the Books, how much the Roman System is made up, of what neither their original Tables, the Law of the Land, their Praetors' Edicts, etc. knew any thing of⁷.

⁷ Gravin. de
Ortu et Progr.
I. C. § 43.

Quum

*Quum permulta praeclare legibus essent constituta, ea ICI torum ingenii pleraque corrupta ac depravata sunt. Mulieres omnes propter infirmitatem Consilii Majores in Tutorum Potestate esse voluerunt: Hi invenerunt genera Tutorum, quae Potestate Mulierum continerentur. Sacra interire illi noluerunt: Horum ingenio Senes ad Coemptiones faciendas interimendorum sacrorum causa reperti sunt*⁸.

Hence they came to be called *Juris Auctores*⁹, *Juris Conditores*¹, which Titles rather belonged to them in the second Period. For the Authority which They properly had to constitute Law, was the Sanction which They first received from *Augustus*, which was revived by *Hadrian*, and compleatly established by the Constitutions of *Theodosius* and *Justinian*².

But during even the first Period, these Opinions were called by the magnificent Name of *Responsa*, to give them an Oracular Turn. And *Tully* calls the House of one of those Lawyers, *Oraculum totius Civitatis*³, and the Office itself *Regnum Judiciale*⁴.

To these Consultations, and to the Honours paid by the Clients, *Tibullus* alludes:

——— me, qui spernentur, Amantes
Consultent: cunctis Janua nostra patet.
Tempus erit, quum me Veneris praecepta ferentem,
Deducat Juvenum sedula Turba senem⁵.

Horace expresses the fatigue of this Attendance more than once:

——— reclusa
Mane domo vigilare, Clienti promere Jura⁶.

And again,

*Agricolam laudat Juris Legumque peritus,
Sub Galli cantum Consultor ubi ostia pulsat*⁷.

And now I am upon this Passage of *Horace*, my Reader may not be displeased to be told what is become of this *Juris peritus*, when at the Recital, a little below, He is sunk into quite another Character: For after

*Eris Tu, qui modo Miles,
Mercator, Tu Consultus modo, Rusticus*⁸———

Behold at ver. 28,

*Ille gravem duro terram qui vertit aratro, [Rusticus]
Perfidus hic CAVPO, Miles, Nautaeque per omne
Audaces mare qui currunt [Mercator] ——*

This will be best considered, by contemplating the proper Function of the Roman Lawyer, and indeed of all Lawyers whatever: which

⁸ Cic. pro Muren. 12.

⁹ D. 5. 4. 3. 19. 1. 39. 37. 14. 17. C. 2. 13. 23. 5. 4. 25.

² C. 1. 17. 1.

§§ 45. 6. 7. 10. l. 2. § 10. eod. l. 3. §§ 10. 20. eod.

³ I. de Orat.

⁴ I. ad Attic. 1. I. de Legg. 3.

⁵ I. 4. 77.

⁶ 2. Epist. I. 103.

⁷ 1. Serm. I.

⁸ Ibid. ver. 16.

RESPONSA PRVDENTVM.

seems to consist in RESPONDENDO, in AGENDO, and CAVENDO. Thus Tully describes him :

⁹ I. de Orat.
48.

*Qui Legum et Consuetudinis ejus, qua privati in Civitate utuntur, et ad Respondendum, et ad Agendum, et ad Cavendum peritus sit*⁹.

And again,

¹ II. de Offic.
19.

*Nam in Jure cavere, consilio juvare, atque hoc Scientiae genere prodesse quam plurimis, vehementer et ad opes augendas pertinet, et ad gratiam*¹.

And therefore as He is often called CONSVLTVS, so is He sometimes moreover called CAVTOR.

² I. de Orat.
55.

ICtus——*Leguleius cautus et acutus, Praeco Actionum, CAVTOR Formularum, Auceps Syllabarum*².

Where other Editions have *Auctor*, and some with *Olivet*, give *Cantor*: but neither, I think, correctly.

It is from such Passages as these, that I had it suggested by a very ingenious Gentleman of this Profession, that this might be the Term, by which Horace would express his Lawyer also :

Perfidus hic CAVTOR —

Which I leave with my Reader ; who will permit me only, upon this Hint, to lay before him some instances of the great Propriety which these technical Words RESPONDERE and CAVERE carry with them in the Roman Law. Passages which will both serve to illustrate this Section, and support this Conjecture. Some of these We have just now seen.

Thus, when Cicero writes to his Friend L. Valerius, a Roman Lawyer, in allusion to his Profession, he has these Words :

³ I. Fam. 10.

*Quanquam qui isthinc veniunt, partim Te superbum esse dicunt, quod nihil respondeas, partim contumeliosum, quod male respondeas*³.—

And when He recommends him to Appius Pulcher, He writes with the same Allusion :

⁴ III. Fam. 1.

*L. Valerium ICtum valde tibi commendo : sed ita etiam, si non est ICtus. Melius enim ei cavere volo, quam ipse aliis solet*⁴.

Every one knows the Merit and Character of Trebatius, who knows any thing of the Roman Law. It is to Him, that Tully addresses

⁵ VII. Fam. 6. himself in these Words⁵ :

Tu, qui ceteris cavere didicisti, in Britannia ne ab Essedariis decipiaris, caveto.

⁶ § 1.

Cicero addressing his Topica to the same Trebatius, writes thus⁶ :

Non potui igitur Tibi, saepius hoc roganti, et tamen verenti ne mihi gravis esses (facile enim id cernebam) debere diutius, ne ipsi Juris Interpreti

Interpreti fieri videretur injuria. Etenim cum Tu mihi meisque multa saepe cavissem, veritus sum, ne, si ego gravarer, aut ingratum id, aut superbum videretur.

So I have seen this Passage quoted, without distrust the Reading, which I find in those Editions, that pretend to Superiority, to be now scripsisses.

In like manner Ovid¹,

¹ I. de A. A. 83.

*Illo saepe loco capitur Consultus amore,
Quique aliis cavit, non cavet ipse sibi.*

And Plautus²,

² Epid. II. 2.
100.

PE. *Quem hominem inveniemus ad eam rem utilem?* EP. *Hic erit optimus:*

Hic poterit cavere recte, Jura qui et Leges tenet.

Again³,

³ Captiv. II.
2. 5.

*Qui cavet ne decipiatur, vix cavet, cum etiam cavet,
Etiam cum cavisse ratus est, saepe is Cautior captus est.*

I would willingly produce one more, which my Reader will confront with the Passage in Horace, at his leisure.

Vigilas Tu [ICTus] de nocte, ut tuis Consultoribus respondeas, Ille [Miles] ut eo, quo intendit, mature cum exercitu perveniat. Te Gallorum: Illum Buccinarum cantus exsuscitat. Tu Aetionem instituis: Ille aciem instruit. Tu caves ne tui consultores: Ille, ne urbes aut castra capiantur⁴.

⁴ Cic. pro
Muren. § 9.

To close this Section: Having observed something of the Magnificence of the Term RESPONDERE, and the Propriety of CAVERE; let me add a word or two upon the Title PRVDENTES. We have seen formerly⁵ an Endeavour of the ancient Lawyers to unite their Profession with the Study of Philosophy. And many Passages of Antiquity give them this Appellation:

⁵ pag. 66.

— τῷ Μητιφίλῳ ζηλωτῇ — ἔτε ῥήτορ ὄντι, ἔτε τῶν Φυσικῶν κληθέντων Φιλοσόφων, ἀλλὰ τὴν ΚΑΛΟΥΜΕΝΗΝ ΣΟΦΙΑΝ, ἔταν δὲ δεινότητά πολεμικὴν, καὶ ΔΡΑΣΤΗΡΙΟΝ ΣΤΗΝΕΣΙΝ, ἐπιήδευμα πεποιημένον καὶ διατρώζοντι, ὥς περ αἵρεσιν ἐκ διαδοχῆς ἀπὸ Σόλωνα, ἣν οἱ μετὰ ταῦτα δικανικαῖς μίξαις τιχῶναι, καὶ μέγα λόγους ἀπὸ τῶν πράξεων τὴν ἀσκήσιν ἐπὶ τῆς λόγου, σοφισταὶ προσηγορεύεσθαι⁶. *

⁶ Plutarch. in
Themistocl.
init.

In this Quotation from Plutarch, We see a *Succesio Prudentum*, a School of Philosophers founded by Solon: in the Manner and upon the Plan of

* *Mnesiphili fuisse asseclam. Fuit hic non Orator, neque ex seclis Philosophorum quos Physicos nominant, verum eam quam Sapientiam vocabant, quae scientia erat Reip. gerendae, et prudentia negotiosa, amplexus est, et tenuit velut seclam ex successionem Solonis, quam sequentes cum artibus confuderunt forensibus, et ab actu rerum trajecerunt meditationem ad verba, unde Sophistae sunt appellati.*

the ancient Philosophy, which branched sometimes into several Heresys (I am not using the Word Theologically) under their respective Leaders. The *Sectae ICTorum*, as I may call them, or Followers of great Masters in the Law, were better known about the age of *Augustus*, when the *Jurisprudencia Romana* was divided into *Sabinianos* and *Proculianos*, and is the Subject of a very elegant Treatise of *Gotfr. Mas-*

⁵ de Sectis in *covius* ⁵.

Jure Civili,

Lips. 1728.8.

⁶ VII. N. H.

37.

⁷ Cent. II.

Epit. Miscell.

1.

⁸ Cic. II.

Offic. 11.

Add. De A-

micit. init.

⁹ Id. de Ami-
cit. § 2.

Add. IV. Ver-
rin. 2.

¹ Cicero Tre-
batio VII.

Fam. 6.

² Pro Muren.

§ 11.

³ Id. Valerio.

ICTo I. Fam.

10.

⁴ Scaliger. ad

Festum, V.

CAVILLATIO.

But every Science had its Parties and Factions, its Schools and their Followers. In Physic it is plain from *Pliny* ⁶, and many Passages in *Galen*. In the ancient Critique we read of the *Alexandrine* School, the School of *Aristarchus*, of *Aristophanes*, of *Callimachus*, and *Crates*: Among the Moderns *Gruter* and *Lambin* have their separate Interests, and it seems to have been the Wish of *Lipsius* ⁷, *Vt exoriatu aliquando Secta Criticorum Lipsiana*.

But to return. The Roman Lawyers have almost engrossed the Term *Sapientia*, as a Characteristic.

C. Laelius, is qui Sapiens usurpatur ⁸.

Sunt ista, Laeli — Sed existimare debes, omnium oculos in te esse conjectos: unum Te Sapientem et appellant et existimant. Tribuebatur hoc modo M. Catoni. Scimus L. Atilium apud Patres nostros appellatum esse Sapientem. Sed uterque alio quodam modo. Atilius, quia prudens esse in Jure Civili putabatur: Cato, quia multarum rerum usum habebat, multaque ejus et in Senatu et in Foro vel provisus prudenter, vel acta constanter, vel responsa acute ferebantur: propterea quasi cognomen jam habebat in senectute Sapientis ⁹.

Quando Medeam agere coepi, illud semper memento:

Qui ipse sibi sapiens prodesse non quit, nequidquam sapit ¹.

Et ab ipsis cautis ICTis eorum Sapientiam compilavit ².

Cur enim Tibi hoc non gratificer, nescio: praesertim cum his temporibus Audacia pro Sapientia liceat uti ³.

In like manner, as the *Sapientia* of this Profession degenerated into *Effrontery*, according to this last Passage of *Tully*, so in Process of Time, did their *CAVERE* into *CAVILLARI*, which We are assured from the best Authority ⁴ is the Origin of that Expression.

IMPERIAL CONSTITUTIONS.

Principum Placita, Decreta, Constitutiones.

J. I. 2. 6.

D. I. 2. 2. II.

D. Lib. I. Tit. IV.

C. Lib. I. Tit. XIV.

And the Commentators.

THE great Revolution, which turned the Roman Republic into a Monarchy, in the Person of *Julius Caesar*, is well worth attending to, and has been frequently illustrated.

The Roman History down to this Period is full of Factions and Disputes for Power, between the two contending Parties, Patricians and Plebeians: till at last by too great a Desire of enlarging their Liberties, they lost them, where they least expected it.

*Non aliud discordantis Patriae Remedium erat, quam ut ab Vno re-
geretur* ¹.

¹ Tacit. I. An-
nal. 9.

The Commons, in order to oppress the Patricians, gave themselves up into the hands of designing Men, and very enterprising Leaders; People of most unbounded Ambition, of which the Commonwealth at this Period afforded a very plentiful Harvest. No one can doubt of the Truth of this, who has heard of the Names of *Sylla*, *Cinna*, and *Marius*, of *Cataline*, *Crassus*, *Pompey*, *Caesar*, *Lepidus*, and *Antony*: and lastly, of that consummate Politician, who closed the Scene, and put an end to the Liberty of Rome, *Octavius*, afterwards better known by the Name of *AVGVSTVS CAESAR*.

As the People listed under Leaders of different Views, and different Interests, it followed, that these Leaders availed themselves of the Powers *given* them by one Party, and of the Advantages they *gained* by the Reduction of the other. Till at last, the Conquering Faction (together with the Conquered) fell a Prey to the Ambition of that Man, by whose Counsel, and under whose Conduct, they had succeeded.

Julius was the first, who carried this Point to any Degree of Sovereignty. He assumed, upon this, the Name of *PERPETVAL DICTATOR*. Dictator was a Name unpopular enough of itself: And *Perpetual* added nothing to the Relish. And to this perhaps He owed his Ruin.

His

IMPERIAL CONSTITUTIONS.

His Heir and Successor, after having cleared his way to Empire, by getting rid of the Rivals of his Power (which Three governed some time under the Title of *TRIVMVI RI EIP. CONSTITVENDAE CAUSA*) made himself sole Master of his Country, and delivered a new kind of Government to his Successors. The Nature of which We will explain after having premised these Words of *Tacitus*,

*Bruto et Cassio caesis, nulla jam publica arma. Pompeius apud Siciliam oppressus, exutoque Lepido, interfecto Antonio, ne Julianis quidem partibus nisi Caesar dux reliquus. Posito Triumviri nomine, Consulem se ferens, et ad tuendam plebem Tribunicio jure contentum: ubi Militem donis, Populum annona, cunctos dulcedine oculi pellexit, insurgere paulatim, munia Senatus, Magistratum, Legum in se trahere, nullo adversante, cum ferocissimi per acies aut proscriptione cecidissent, ceteri Nobilium, quanto quis servitio promptior, opibus et honoribus extollerentur: novis ex rebus aucti, tuta et praesentia quam vetera et periculosa mallent*⁴.

⁴ I. Annal. 2.

The new Government was something of a Military Turn. The Term, *IMPERATOR*, which *Julius* had also made use of before Him, did not put them in mind of the Loss of their Liberty, but the Success of their Arms. A Nation of Soldiers, a *Populus Militum*, did not scruple to afford him an Appellation they had complimented him with so often before: nor could they at once discern an *Emperor* under *Imperator*.

Gravina trifles, when He imagines that the *Caesars* took the Title *Imperator* for any other reason; or because the Term *Imperare* was softer than *Jubere*: and indeed He seems to be ashamed of his Observation⁵.

⁵ De Romano Imperio § 5.6.

Augustus, to obviate all Suspicions of being perpetual, or rather of appearing so, took care to have his Power renewed to him from Time to Time: and managed with that Address (as He was perhaps the greatest Dissembler the World ever knew) that He never appeared to seek it for his own sake, but always pressed by the People or Senate to take the Weight upon him for theirs.

To this is owing what We so frequently meet with in Medals, the *Decennalia* of the Roman Emperors: who, though created for Life, celebrated the Renewal of the Imperial Power, at ten Years end, in imitation of this Practice of *Augustus*⁶.

⁶ Dion Cassius LIII. 13.

The Emperor also was called *PRINCEPS*; a Name not so near to Royalty, as it is at this Day.

*Non Regno, neque Dictatura, sed Principis nomine constitutam Rempublicam*⁷.

⁷ Tacit. I. Annal. 9.

This Word had been in use under the Republic, as in the case of *Princeps Senatus*. So that the Emperor was no more in Appearance than the *First Man in the City*.

So

So *Tiberius*, according to *Dion Cassius*, was used to say, that He was *Dominus Servorum, Imperator Militum, ceterorum Princeps, i. e. Caput Civium*⁸.

⁸ LVII. 8.

So *Ovid* to *Romulus*, upon *Augustus*,

*Tu Domini nomen, Principis Ille tenet*⁹.

⁹ II Fast. 142.

PATER PATRIAE was another Appellation.

*Recepit Julius praenomen Imperatoris, cognomen Patris Patriae*¹.

¹ Sueton. in Jul. § 76.

This Title had been given to *Tully* in the Affair of *Catiline*. And it was meant by the Emperors to express an Authority, but an affectionate one: and to put themselves in mind, how much the Republic was their Concern, and how dear it ought to be to them.

But all these Titles carried with them but little of Jurisdiction. Power followed Office. Therefore with *Tacitus*, *Munia Magistratum in se trahebat*. He was accordingly *Cof.—Procof.—P. M.—Trib. Pot.—Censor*, and, in short, every thing He had a mind to, or was serviceable to his Purpose.

For in the Infancy of this new Government, the Romans were fond of looking upon their old one, not as abolished, but as protected, and preserved to them: the ancient Form still residing in their several Magistracies, which were now held by their Prince *per Saturam*.

This took off from the Rigor of being governed by a *single Man*. His Commands were not considered as the absolute Will of a particular Person, but as the Acts of diverse Magistrates in conjunction.

² Sueton. et Dion Cassius.
³ Dig. Lib. I. Tit. 16.

Augustus took the CONSULATE, sometimes to himself, sometimes in Partnership: Sometimes for a short Season, and sometimes for a longer Period, as best suited his Purpose, and his Politics⁴.

Cod. Lib. I. Tit. 35.
De Officio Proconsulis. Campian. de Magistrat. Rom. p. 259, seqq.

The Emperor was PROCONSUL, and that perpetual. This gave him a Jurisdiction, wherever He went, and raised his Authority very high⁵. Yet it appears but rarely among his Titles in Inscriptions, etc. which several have endeavoured to account for⁶.

⁴ Gravin. de Imper. Rom. § 10.

By the Title PONTIFEX MAXIMVS He put himself at the Head of all religious Affairs. He was also AVGV, and soothed by that means the Populace, who were fond of having every thing done *auspicato*, et *more majorum*.

⁵ Sueton. in Jul. § 76.
Cic. IX Fam. 15.

Julius took the Office of CENSOR, under the Title of *Praefectura Morum*⁷, probably because *Pompey* had declined taking the old one. His Successors had no Scruple with the Title of Censor.

Dion Cassius. XLIII. 14.
LIV. 10.
Gravin. de Rom. Imper. § 9.

The TRIBVNITIA POTESTAS was very agreeable upon account of its Weight and Authority: again, because it put him at the Head of the Commons: and lastly, because it added some Security to his Person. POTESTAS, the Power of the Office, not the Office itself; like putting it into Commission. For the supreme Magistrate was supposed to be a Patrician, though He might happen to be a Plebeian⁸.

⁶ C. 12. 1. 8.
Gravin. de Imp. Rom. c. 8.
Capitolin. in Macrino.

UNDER THIS new Form of Government, the *Leges* and *Plebiscita* were for some time allowed to be enacted: These being so many *Vestigia morientis Libertatis*, as *Tacitus* calls them; and *Augustus* was too much a Politician to forget, that sudden Changes are always dangerous. The *Comitia*, or the People's Right of making Laws, were supported after the Republic, both by *Julius* and *Augustus*.

⁵ Sueton. in Jul. § 41.

⁶ Id. in August. § 40.

Comitia cum Populo partitus est ⁵.

Comitiorum pristinum Jus reduxit ⁶.

That is, the Form was kept up by these two Princes: and the People had the cold Compliment of enacting what the Emperor was willing to have established for Law. The many Laws called *Julia*, which were enacted under *Augustus*, and at his Promotion, are an Instance of this. Under this Period also were the *Lex Fusia-Caninia*, *Aelia-Sentia*, *Papia-Poppaea*; under *Tiberius*, *Junia-Norbana*: and something like it under *Claudius* and *Galba*, chiefly in regard to Adoption, or rather, Arrogation ⁷.

⁷ Tacit. XII. Annal. 26. I. Hist. 15. Noodt. I. Obferv. 3. Id. ad D. Lib. I. Tit. 7. De Adoptionibus.

⁸ Dion Cassius LIX. 9.

⁹ Noodt. T. II. pag. 8.

¹ III. Annal. 28.

The *Comitia* were restored to the People by *Caligula*, but soon resumed ⁸. And there are also some Instances of the People's Consent being formally asked long after *Tiberius* ⁹.

Yet for all this, the Roman Legislation at this Juncture took a new Face: and Law became absolutely the Breath of the Emperor. For now He had gained his Point, and according to *Tacitus* ¹,

Sexto demum Consulatu [A.V.C. 725.] Potentiae securus—dedit jura quæis pace et principe uteremur.

Thus was a final Period put to the *Leges* and *Plebiscita*, to all effectual Purposes, and no more is heard of them in the Roman History. And this conducts me to consider that which came in their room, and what I promised formerly to consider, and in this Place, viz.

The Second Period of the

SENATVS CONSVLTA.

And of this Aera must the Emperor and *Pomponius* be understood, when they give their Account of the antient *SCta*. This Revolution

² D. 1. 3. 9. of Law gave occasion to the well known saying of *Vlpian* ²,

Non ambigitur Senatum Jus facere posse.

The Will and Pleasure of the Emperor was made known two ways: either *mediante Senatu*, or *sine Senatu*.

Leges ut generales ab omnibus æquabiliter in posterum observentur, quæ vel missæ a Nobis ad venerabilem Coetum [i. e. Senatum] ORATIONE conduntur, vel inserto EDICTI vocabulo nuncupantur ³.

³ C. 1. 14. 3.

It

It was upon the Suggestion of *Maecenas*⁴, that *Augustus* conveyed his pleasure through the Channel of the Roman Senate. The Measure was popular enough: *Τὰ κοινὰ κοινῶς διακρίσθαι*⁵ *.

⁴ Dion Cassius
LII. 31. seqq.

⁵ Dion Cassius
ibid.

Thus We come by the *SCtum Silanianum*, and *Statilianum*, under that Emperor: which took their names, the Former from *C. Junius Silanus*⁶, *Cos. A. V. C. 761*. the Other from *T. Statilius Taurus*, who succeeded the next Year.

⁶ Cujac. f.
Observ. 18.

Though this Scheme was begun by *Augustus*, it was perfected by his Successor. Of whom *Tacitus* writes⁷ (which is no unusual thing) as if He had been the Projector.

⁷ I. Annal. 15.

Tum primum e Campo Comititia ad Patres translata sunt. Nam ad eam diem, etsi potissima arbitrio Principis, quaedam tamen studiis Tribuum fiebant. Neque Populus ademptum Jus questus est, nisi inani rumore.

This Stroke of Policy was not unobserved by *Suetonius*⁸, who remarks what Court the Emperor paid to the Senate. However it must not be imagined, that the Emperor left them to exercise the Right of making *SCta*, *pro eorum arbitrio*. The Method was to lay before them the Pleasure of the Prince, which was then ratified by the Senate, and so became a Law for the People⁹.

⁸ in Tiber.
§ 29. 30.

*Consules relationem incipere non ausi, ignaro Principe, perscripsere tamen consensum Senatus: ille an Auctor Constitutionis fieret*¹.

⁹ Gothofr. ad
D. 23. 2. 16.

¹ Tacit. XIII
Annal. 26.

The Process was thus:

The Emperor first addressed the Senate by his Oration, importing his Opinion. Hence, in many Places, where mention is made of a *SCtum*, it is added, that the Emperor by an Oration made in the Senate, *Auctor fuit Senatus censendi*, or, *effecit ut Senatus censeret*. It is for this Reason, that *SCta* are sometimes very properly called *Jura Orationibus Principum constituta*: And, like the Preambles to our Acts of Parliament, the Lawyers often made use of them to explain the *SCtum* by.

² Guther. de
Offic. Dom.
Aug. I. 30.
seqq.
Christian. Ot-
to de Oratt.
Principum in
Senatu Ro-
mano. 1678.
12.

Of these Orations (concerning which I refer my Reader to two good Authors² for farther Satisfaction) there is much mention, and some Remains, in Antiquity. The Oration of *Augustus ad suadendam Legem Papiam* was of another Sort, something of which We have seen above³. There is now extant at Lyons an Oration of *Claudius, de supplendo Senatu ex Nationibus exteris*. It is to be seen in *Gruter*⁴, and is a very valuable Antiquity. Nothing more of this kind that I know of, is come down to us any way perfect. But of the Orations of *Marc. Antoninus*, of *Commodus*, *Severus*, *Caracalla*, etc. there are frequent *Vestigia* in the Books of Roman Law⁵.

³ pag. 190.
⁴ DII.
⁵ D. 2. 12. 1. 2.
2. 15. 8.
23. 2. 16.
23. 3. 20.
24. 1. 3.
24. 1. 23.
24. 1. 32.
27. 9. 1.
Brissotius I.
Antiqq. 6.

* *Publica publice administrari.*

⁶ Aurel. Vict.
in Vitellio.

⁷ Sueton. Aug.

§ 65.

Dion Cassius

LIV. 25.

LX. 2.

⁸ in Nerone,

§ 15.

⁹ Dig. Lib. I.

Tit. XIII.

Cod. Lib. I.

Tit. XXX.

De Officio

Quaestoris.

C. 1. 23. vlt.

Reines III.

Var. 16.

Briffon. I. An-

tiqq. 17.

Tacit. XVI.

Annal. 27.

Guther. de

Offic. Dom.

Aug. II. 18.

¹ See Cassio-

dor. I. Var. 12.

² Coripp. Pa-

negyr. ad A-

nastasium

Quaestorem.

³ Sueton. § 6.

⁴ Spartian. in

Hadrian. init.

⁵ Symmach I.

Epist. 89.

These Orations were recited chiefly by the Emperor himself in Person, down as far as *Vitellius*⁶. After *Vitellius*, says my Author, this Office devolved upon the Quaestor. I doubt the Accuracy of this Account. For I find the Quaestor employed in this very Business, as high as the Age of *Augustus* in two very considerable Historians⁷. And indeed by a Passage in *Suetonius*⁸, it appears to have been for some continuance the proper Function of this Officer to read in Senate, what the Emperor did not choose to pronounce himself.

De quibusdam rebus rationes ad Senatum missas, praeterito Quaestoris officio, per Consulem plerumque recitabat.

The Quaestor formerly had the Finances for his Department. But his Office shifting under the Emperors, we find him *ab intimis Consiliis*, the Mouth of the Sovereign, of great Rank, and very high in the Administration⁹. Hence He is called in the Law-Books, etc. *Iustitiae et Legum Custos*—*Os Imperatoris*—*Armarium Legum*—*Μίγας Λογιστην*—*Custos Legum et Famae publicae*¹.

*Summe Magistratum, Procerum decus, Arbiter Orbis,
Principis auspicio leges et jura gubernans,
Iustitiae vindex*².

There are many Instances of the Dignity of this Office. *Titus* executed it under his Father³. *Hadrian* (who was a Scholar and a Lawyer, and composed the Orations, as doubtless other Quaestors did) under his Uncle *Trajan*⁴. And when particular People were complimented with this Function, either during a Vacancy, or for a Mark of extraordinary Respect, We see them express their Sense of the Honour in a very high strain of Language :

*Contestare apud invictos principes gaudium meum, qui humanae vocis divinas literas crediderunt, quorum victorias ex mei oris promptuario Senatus audiuit, cum mihi a principibus aeternis legenda in concilio Patrum delegaretur Oratio*⁵.

To proceed :

Upon the Oration of the Prince was formed the Decree of the Senate, and was generally affixed to it. So that they made Law together. Hence it is, that the same thing is sometimes ascribed to the Oration of the Prince, and sometimes to the Decree of the Senate indifferently⁶.

The next and last Process in these *SCta* was, that the Emperor by an *EDICT* or Proclamation ordered to be observed as Law, what the Senate had now decreed. And this was done in imitation of the former Magistrates, who are said, as We have noted above, *Edicere* in things relating to their own Province or Jurisdiction. Thus *Augustus*, as *Cos. Procos. Tribune, General, Pontifex, Censor*, etc. when He published his several Edicts, did *suo Magistratu fungi*.

But

But when the Power of the Emperor came to be well established, they found, that though this Intervention of the Senate was popular enough, they could however do sufficiently well without it. Accordingly they overleaped the middle Step, and, *inconsulto Senatu*, began with the EDICT at once, as a much shorter way. This Period of Roman Law is generally fixed with *Hadrian*, and not without reason. The Law under him suffer'd a very considerable Revolution ⁷. And though We read of some few SCTA after this time (as for instance, besides the *Sctum Julianum*, *Apronianum*, *Tertullianum* under that Emperor, the *Orphitianum* under *M. Antoninus*, and something also under *Theodosius* and *Valentinian* ⁸), and some few EDICTS before it (I place them in the Margin in order of time ⁹): However I observe, that this was the principal Date or Epocha of this kind of Law, which will not be much disturbed or contradicted by a few ineffectual Instances on either side. Indeed the *SCTa* kept up their Being, such as it was, but little Authority with it, down as far as *Justinian* ¹; but under *Leo* were sunk into Nothing ².

⁷ See above, page 14, 15.

⁸ C. 1. 14. 3.

⁹ D. 48. 18. 8.

48. 10. 15.

50. 7. 4. 6.

48. 3. 2.

40. 15. 4.

¹ Procop. A. need. c. 14.

² Nov. Leon. 78.

HAVING thus taken a formal Leave of *SCTa*, We are led to *Edicts*: which I was just now considering as the Sanction or final *Part* of a *SCTum*, till by a Figure of Imperial Rhetoric, they came to stand for the *Whole*.

EDICTS.

Edict in the Roman Law ³ is a general Word, and stands divided into ³ C. 1. 14. 3.

EPISTOLAE,

DECRETA, and

EDICTA, properly so called.

The *First* and *Second* are Law at the Instance of Parties, and at the Solicitation of others: The *Third* proceeds *ex mero motu Imperatoris*.

Sive eas Motus spontaneus ingesserit, sive Precatio, — vel Lis mota Legis occasionem postulaverit ⁴.

Quodcunque Imperator per Epistolam constituit, vel Cognoscens decrevit, vel Edicto praecepit, Legem esse constat ⁵.

⁴ C. 1. 14. 3.

⁵ J. 1. 2. 6.

Add. D. 1. 4.

1. 1.

I. EPISTOLAE,

Or *Rescripts* of the Emperor. By these He gave answer *de Jure Controverso*, when He was applied to for his Judgment and Decision, both at Home, and from the Provinces. And these make up the greatest Part of the *Code*, which is little more than a Collection of this kind of Imperial Law; but Law, dispensed sometimes with such signal Partiality, that *Macrinus*, one of the Emperors, had a Design to strip all his Predecessors' Rescripts of their Authority.

Fuit

IMPERIAL CONSTITUTIONS.

Fuit in Jure non incallidus, adeo ut statuisset omnia Rescripta veterum Principum tollere, ut Jure, non Rescriptis, ageretur, nefas esse dicens leges videri Commodi et Caracalli, et hominum imperitorum voluntates, quum Trajanus nunquam libellis responderit, ne ad alias causas facta preferrentur, quae ad gratiam composita viderentur⁷.

⁷ Capitolin. in vita. c. finem.

The Application made to the Emperor was per *Epistolas* vel *Libellus* ⁸ *supplices*, called also *Preces*.

⁸ D. 19. 2. 19. 9.

Quaestio omnis ex precibus Imperatori oblati ad sacrum Auditorium pertinebat⁹.

⁹ Symmach.

X. 55.

¹ Plaut. Mil.

IV. 6. 10.

² C. Lib. I.

Tit. XIX.

Per Epistolam quasi Regem adiri eum aiunt¹.

There is a whole Title in the *Code*² to regulate these Proceedings :

DE PRECIBVS IMPERATORI OFFERENDIS ET DE QVIBVS REBVS SVPPPLICARE LICEAT VEL NON.

There are Instances of these Petitions (the Greek Lawyers call them *Αξιώσεις*) with the Answers now extant.

Αξίωσις Εὐδαίμονος Νικομηδείας πρὸς Ἀντωνίνον Βασιλέα. Κύριε Βασιλεῦ Ἀντωνίνε, ναυφραγίον ποιήσαντες ἐν τῇ Ἰταλίᾳ, διηπάγημεν ὑπὸ τῶν δημοσίων τῶν τῆς Κυκλάδας νήτας οἰκόντων. Ἀντωνῖνος εἶπεν Εὐδαίμονι. Εγὼ μὲν κύριος, ὁ δὲ νόμος τῆς θαλάσσης. Τῷ νόμῳ τῶν Ροδίων κινέσθω τῷ ναυτικῷ, ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιῆται, τὸτο δὲ αὐτὸ καὶ ὁ θεότατος Αὐγύστης ἐκρινεν. Id est, DEPRECATIO EVDAEMONIS NICOMEDIENSIS AD ANTONINVM IMPERATOREM. Domine Imperator Antonine, naufragium in Italiā facientes direpti sumus a Publicanis Cycladas insulas habitantibus. RESPONDIT ANTONINVS EVDAEMONI. Ego quidem mundi Dominus, Lex autem maris. Lege id Rhodia, quae de rebus nauticis praescripta est, judicetur, quatenus nulla nostrarum legum adversatur. Hoc idem Divus quoque Augustus iudicavit³.

³ D. 14. 2. 9.

⁴ Gruter. DCVII. 1.

Briffonius has given us what follows from a Marble⁴.

EXEPLV LIBELLI DATI.

CVM ANTE HOS DIES COIVGEM ET FILIVM AMISERIM ET PRESSVS NECESSITATE CORPORA EORVM FICTILI SARCOFAGO COMMENDAVI RIM DONIQVIES LOCVS QVEM EMERAM AEDIFICARETVR VIA FLAMINIA INTER MILIAR. II. ET III. EVNTIBVS AB VRBE PARTE LAEVA CVSTODIA MONVMENTI FLA. THVMELES A MESOLO M. SELI ORCILI ROGO DOMINE PERMITTAS MIHI IN EODEM LOCO IN MARMOREO SARCOFAGO QVEM MIHI MODO COMPARAVI EA

CORPORA COLLIGERE VT QVANDONE EGO
ESSE DESIER PARITER CVM EIS PONAR.

FERETRVN FIERI PLACET. IVBENTIVS CELSVS
PROMAGISTER SVBSCRIPTI III. NON.
NOEMB. ANTIO POLIONE ET OPIMIANO
KOS. ORDINARIS SEVERO ET SABINIANO
COS.

Though This has something of the Form of a Petition, and an Imperial Rescript, it is perhaps rather an Application of a private Nature, as This also, which follows, is still more so :

C. IVLIVS CANDI
DVS LIB. SAMIARIS
QVINTIANVS SALVTEM.

CVM PETIERITIS A ME
VT SI CVI QVID VESTRVN
HVMANITVS ACCIDERIT
IS IN LOCVM QVI EST IN
FVNDQ AESCHINIANO MEO
INTRANTIBVS A VIA PARTE
LAEVA A MONVMENTO TES
TACIO PER LONGITVDINEM
PEDVM CLXXV LATITVDIN
A MACERIA INTRORVRSVS
PEDVM XXV INFERATVR
ID IVS CONCEDERE ME
HAC EPISTVLA NOTVM
VOBIS FACIO BENE VALERE
VOS CVPIO
DATA XIII K. IVLIAS IN HORTIS
STATILIAE MAXIMAE
CEIONIO COMMODO ET } COS.
CIVICA POMPEIANO }

⁵ Gruter.
DCCCLXXIV.
5.

This Practice of consulting the Emperor upon nice and difficult Cases, with the Return of his Opinion, is to be seen more distinctly in the Correspondence which is come down to us of *Pliny* and *Trajan* : and it is moreover exemplified in a pretty History recorded of *Atticus*, the Father of *Herodes Atticus*, by *Philostratus*.

ΑΤΤΙΚΟΥ

Αττικὸν — Ἡράδης πατέρα ἔπεριεῖδεν ἡ Τυχὴ, — ἀλλ' ἀνίδειξεν αὐτῷ
Θησαυρὸν χρῆμα ἀμύθητον, ἐν μιᾷ τῶν οἰκιῶν, ὅς πρὸς τῷ θεάτρῳ
ἐκέκτητο. Οὐ διὰ μέγεθος εὐλαβὴς μᾶλλον ἢ περιχαρὴς γινόμενος, ἔγραψε
πρὸς τὸν αὐτοκράτορα ἐπιστολὴν, ὧςδε συγκεκλήνη. “Θησαυρὸν, ὦ βασιλεῦ,
ἐπὶ τῆς ἑμαυτοῦ οἰκίας εὗρηκα. Τί ἐν περὶ αὐτῆς κελεύεις;” καὶ ὁ αὐτο-
κράτωρ, (Νερούας δὲ ἦρχε τότε) “χρῶ,” ἔφη, “οἷς εὖρες.” Τῇ δὲ
Αττικῇ ἐπὶ τῆς αὐτῆς εὐλαβείας μείναντος, καὶ γράψαντος “ὕπὲρ ἑαυτοῦ
εἶναι τὰ τῷ Θησαυρῷ μέτρα,” “καὶ παραχρῶ,” ἔφη, “τῷ Εἰμαίῳ, σὺν
γάρ ἐστι.” * *

⁶ Philostrat. II.
de Vitae So-
phistae. 2.

The Translator here has not done Justice to his Author. He should have been more attentive to the Delicacy of the Passage, and the Words *χρῶ* and *παραχρῶ*: *Vtere* and *Abutere*. For so the Roman Writers in general, as well as the Roman Lawyers, distinguish between *usum* and *abusum*, that the former shall signify something like *Usufruct*, or a *Jus utendi fruendi, salva rei substantia*, the other a Right over the Substance itself. Which, with something more that I have observed upon this particular, may one day serve to clear up more effectually a passage in St. Paul, who distinguishes between τὰς τῷ κόσμῳ χρωμένους, and τὰς

⁷ 1 Cor. VII. καὶ ἀχρωμένους⁷. Both which some Translators render by *mundo utentes*. 31.

To these Petitions, or *Libelli supplices*, the Emperor answers *per*
⁸ D. I. 4. 1. *Epistolam et Subscriptionem*, as *Ulpian* expresses it⁸. i. e. *per Epistolam a*
⁹ VI. Sat. 84. *se subscriptam*: *Εν δὲ δι' αὐτῶν*, like that of *Juvenal*⁹,

Prodigia et mores urbis damnante Canopo, i. e. mores prodigiosos.

The Rescripts of the Emperors *Hadrian*, *Marcus Antoninus* and *Severus* are celebrated above the rest. Of the Former there is extant something which looks like a Collection of Rescripts or Opinions.

¹ Jurispruden-
tia Ante-Justi-
niana, to-
wards the
end.

² Biblioth. Gr.
Tom. XII.
pag. 514.

³ Philostrat.
Epist. I.

We owe it to *Dositheus* a Grammarian. See *Schultingius*¹ and *Fabricius*². It is recorded of *Severus*, that he drew up his Answers upon the best Advice, and with the assistance of his Lawyers; and of *D. Marcus* we read,

Βασιλέων δὲ ὁ Θεοπέσιος Μάρκος ἐν οἷς αὐτὸς ἐπέειλε πρὸς γὰρ τῷ κε-
κριμμένῳ τῷ λόγῳ, καὶ τὸ ἐδράϊον τῷ ἡθὺς ἐντετύπῳ τῷ γράμμασι³.†

If this passage is to be understood of his public Rescripts, and not rather of his private Correspondence.

* *Atticum* — *Herodis patrem non neglexit Fortuna* — *verum Thesaurum ei ostendit immensum in domorum aliqua reconditum, quas prope Theatrum possidebat. Cujus quidem magnitudine, metu magis quam gaudio plenus ad Imp. epistolam scripsit, his verbis contextam, Thesaurum, Imperator, domi meae inveni, quid de eo fieri jubes? Imperator itaque (Nervia autem regnabat) Vtere, respondit, iis quae invenisti. Cumque Atticus in eodem metu persisteret, scriberetque modum Thesauri sortem suam superare; praeter modum ergo eo utere, ille respondit, quod fortuna tibi obtulit: tuum enim est.*

† *Ex Principibus vero Romanorum D. Marcus [enituit maxime] in his quae ipse scripsit: Praeter verba enim eleeta morum etiam firmitas quaedam et constantia epistolis ejus expressa est.*

Some

Some Lawyers with a super-abundant Accuracy have distinguished Rescripts into many sorts or kinds, as here follows :

When the Emperor returns his Answer and Direction

<i>Ad Axiōtus Partium</i>	they are	<i>Adnotationes</i>	5 C. 1. 23. 6. seq. 1. 19. 1. 6 D. 22. 5. 3. 1. 7 C. 1. 23. 7. 1.
<i>Ad Consulta Magistratum</i>		<i>Subnotationes</i> 5	
<i>Ad Desideria Vniversitatum</i>		<i>Epistolae</i> 6 <i>Pragmaticae Sanctiones</i> 7.	

II. DECRETA.

These were Sentences in Court, or Decrees in Judgment 8, and, according to the Practice which still prevails, were either INTERLOCUTORY, namely, such as related to any point of incidental Law, that might turn up in the Course of the Process: or DEFINITIVE, viz. such as determined upon the Merits of the Cause itself, and the whole Question.

Augustus, according to *Suetonius* 9, often sat in Court to hear and determine Causes, from Morning to Evening. And so did *Claudius* 1.

The Manner and Method of these Judicial Determinations is well explained by *Jac. Gothofred* 2.

The Lawyer *Paulus* collected the Decrees of the Emperors in six Books 3.

III. EDICTA.

Edicts are mere voluntary Constitutions, *Quae Motus spontaneus ingesserit*, and directed to general use. Which therefore being most strictly universal Law, is called *Lex Edictalis* 4.

As these are not returned in the way of Answer, they differ from Rescripts: as they are not given in Judgment, in *Jurisdictione Contentiosa*, they differ from Decrees: as they are not founded upon Sollicitation, they differ from both.

It is to be observed, that though *Jure Codicis*, all the Emperor's Decrees were made Law, and called *Oracula*, *Apices Sacri*, *Divalia Beneficia*, *Leges Aeternae*, *Publica Jura*, etc. Yet, properly speaking, Edicts did not pass for Law, unless Custom and Prescription had given them that Power, or they had been confirmed by a *SCtum* 5.

To Edicts I would subjoin MANDATES, which are distinguished only from them, by being more confined, and directed to particular Persons.

To these belongs the fifteenth Title of the first Book of the Code.

The precise and original meaning of Mandates, is, *Instructions* and Orders, commonly *Private* ones, given by the Emperor to his Lieutenants and Officers 6.

Cujacius 7 reckons these among particular and special Constitutions.

To all these I add INTERPRETATION, which seems to make a distinct Species. For *Interpretatio* also *est Lex, sive Constitutio*². And the Emperor¹ seems to distinguish *Interpretation* from the rest, as not being included in any of the foregoing Species. As also, between *Leges condere* and *Leges interpretari*.

The Power of Interpreting belonged to the Prince alone³.

² C. 1. 14. 1.

19. l. 12 eod.

³ Symmach.

X 40.

⁴ Idem.

*Operior, quid Deliberatio Augusta constituat, cui soli fas est de Scitis Divilibus judicare*⁴.

*Nos venerari potius, quam interpretari, Oracula divina consuevimus*⁴.

CONSTITUTIONS are either *General* or *Special*.

By *Special* are meant *Privilegia*.

Though these are called *Special*, because they relate to *one* Person only, yet in some sense, they may be said to be *General*, because *all* Persons are restrained by this Grant, from interrupting that Man, to whom the Privilege is granted, in the use and exercise of it.

This is the proper Place of speaking to Privileges, because in absolute Governments they were more frequent, than in Republics.

For the Law of the XII Tabb. was

PRIVILEGIA NE IRROGANTOR.

*Vetant Leges Sacratae, vetant XII Tabulae, Leges privatis hominibus irrogari*⁵.

⁵ Cic pro Domo. § 17.

*Tum LL. praeclarissimae — quarum altera Privilegia tollit — Majores in posterum providisse: in privatos homines Leges ferri noluerunt: Id est enim Privilegium. Quo quid est injustius? Cum Legis haec vis sit, Scitum est Jussum in omnes*⁶.

⁶ Cic. de LL. III. 19.

⁷ Andocid. de Mytter. p. 12. Edit Steph. Demosth. c. Aristocr pag. 287. Ed. noth. Petit. Comment. in LL. Att. Lib. II. T. 1.

Doubtless in conformity to the Constitution of Athens, and a Law of Solon, viz. *To make no Rule, but what took in all Men indifferently*⁷.

Which was, and is, in all States, the *Jus Ordinarium Civitatis*. Privileges are *Exceptions*, something granted *extra ordinem*. And the People of Rome would sometimes, though sparingly, confer a *Privilegium Comitibus Centuriatis*⁸.

⁸ Cic III de LL. 19.

⁹ A. Gellius. X. 20. Add. Festus. V. PRIVVS. Scalig. ad loc. Isidor. V.

Origg. 18. Bentl. ad Hor.

A. P. ver. 60.

¹ See D. 50.

15. 3. 1.

50. 17. 68. and

196.

Privilegium therefore is *Lex Privata*. For, as the Grammarians write, *Veteres PRIVA, quae nos Singula*⁹.

They are either *Real* or *Personal*. *Real* are such, as are granted to Cities, as Immunities, etc. or granted *intuitu Rei vel Causae, non Personae*. Thus that Right which attends Executorships (not the Person of the Executor) viz. *Ante omne creditum deducendi Impensas Funeris*, is called a Privilege, and a *Real* one.

It is a Rule of Law,

*Privilegia Causae, non Personae, ambulant cum Re*¹.

The manner of their passing is well described; not to the Heirs, in capacity of Heirs, but as Possessors *Rei Privilegiatae*. For *Omnia Privilegia Rei concessa, cum Re ipsa ad Possessores transeunt*.

Personal

Personal Privileges are such as the Emperor grants to particular People, for their own Emolument: and not to descend². Hence the common Phrases, upon Personal Privileges,

Cum Persona moriuntur, or, extinguuntur.

Non egrediuntur Personam.

*Ad Heredes non transeunt*³.

Yet with this Restriction: *Nisi beneficio Principis nominatim de ea re cautum sit*⁴.

Personal Privileges are of three Sorts:

I.

Indulgentia propter Meritum. As when the Prince grants to any Person, for some Services performed by him, an Immunity from any public Duty or Assessment. These are more properly *Beneficia*, or *Jura Singularia*⁵. They are also called *Privata Privilegia*⁶, *Personalia Rescripta*⁷. Instances of this sort may be seen in the Laws quoted in the Margin⁸.

II.

Si cui sine Exemplo subvenit, puta, cum Gratiam Delicti fecit. Thus Executions are *ex Jure ordinario*: But a Respite, or Reprieve is *Privilegium*, something *extra ordinem datum*, an Exception to this general Disposition.

III.

To understand the third Sort, observe, that Privileges are not always on the fair Side. *Privilegia sunt vel Favorabilia vel Odiosa*. Thus Punishments *extra Legem*, or *praeter Legem*, are to all purposes *Privilegia*. Such was the Law, the *Lex Priva*, brought by Pompey against Milo: and by Clodius against Cicero⁹.

*Lex est Generale Jussum Populi aut Plebis, rogante Magistratu. Ea Definitio si probe facta est, neque de Imperio Cn. Pompeii, neque de Reditu M. Ciceronis, neque de caede P. Clodii Quaestio, neque alia id genus Populi Plebisve Jussa, Leges vocari possunt. Non sunt enim generalia Jussa, neque de Vniversis Civibus, sed de Singulis concepta. Quocirca Privilegia potius vocari debent, quia Veteres Priva dixerunt, quae Nos Singula dicimus*¹.

*In majore fraude convictos, legitimam poenam supergressus, ad Bestias condemnavit*².

² J. 1. 2. 6.
D. 1. 4. 1. 2.

³ D. 1. 3. 14.
¹⁵.
D. 50. 6. 1. 1.
D. 50. 17. 68.
¹⁴¹. 196.
⁴ D. 50. 6. 4.

⁵ Cujac. XV.
Obs. 8.
Add. Guther.
de Offic. Dom.
Aug. 1. 37. 38.
Jac. Gothofred. ad XII.
Tabb. pag.
228.
⁶ l. 4. C.
Theod. de
itin. mun.
⁷ l. 5. eod.
⁸ D. 49. 15. 5.
ult.
50. 7. 17.

⁹ Cic. pro
Domo § 17.

¹ Gell. X. 20.

² Sueton. in
Claud. § 14.
D. 48. 19. 29.
D. 1. 6. 2.

LEX REGIA.

J. 1. 2. 6.
D. 1. 4. 1. *pr.*
C. 1. 17. 1. 7.

- Jac. Mazochii Epigrammata Antiq. Urb. pag. XIII.*
Gruter. Inscript. CCXLII.
Guther. de Offic. Dom. Aug. I. 31.
Gravina Origg. J. C.
Eccardus de L. Regia.
Heinecc. Antiqq. Rom. I. 2. § ult.
Mart. Shooock. Epistola de Figmento L. Regiae.
J. Frid. Gronovii Oratio de L. Regia.
A. Augustin de LL. et SCTis. C. 18. et in Lege Regia.
Trivor. Observ. Apol. C. 4. apud Ott. Thes. T. I.
Matth. Aegypt. ad SCTum Marcianum. p. 164. 167.
Noodtius de Jure Summi Imperii et Lege Regia.
——— *Observ. I. 3.*
Scipio Gentilis de Lege Regia.
Vrsinus ad Legem Regiam.
Manutius de Legg. C. 2.
Hoppius. pag. 33. Edit. 1736.
Magius IV. Lect. Miscell. 6.
Campian. de Magistrat. Rom. pag. 25.

——FOEDVSVE CVM QVIBVS VOLET FACERE LICEAT ITA
VTI LICVIT DIVO AVG TI IVLIO CAESARI AVG TIBERIOQVE
CLAUDIO CAESARI AVG GERMANICO.

VTIQUE EI SENATVM HABERE RELATIONEM FACERE
REMITTERE SENATVS CONSVLTA PER RELATIONEM DIS-
CESSIONEMQVE FACERE LICEAT ITA VTI LICVIT DIVO
AVG TI IVLIO CAESARI AVG TI CLAUDIO CAESARI AVG
GERMANICO.

VTIQUE

VTIQUE CVM EX VOLVNTATE AVCTORITATEVE IVSSV
MANDATVVE EIVS PRAESENTEVE EO SENATVS HABE-
BITVR OMNIVM RERV IVS PERINDE HABEATVR SER-
VETVR AC SI E LEGE SENATVS EDICTVS ESSET HABE-
RETVRQVE.

VTIQUE QVOS MAGISTRATVM POTESTATEM IMPERIVM
CVRATIONEMVE CVIVS REI PETENTES SENATVI POPV-
LOQVE ROMANO COMMENDAVERIT QVIBVSQVE SVFFRA-
GATIONEM SVAM DEDERIT PROMISERIT EORVM COMI-
TIIS QVIBVSQVE EXTRA ORDINEM RATIO HABEATVR.

VTIQUE EI FINES POMERII PROFERRE PROMOVERE
CVM EX REPUBLICA CENSEBIT ESSE LICEAT ITA VTI
LICVIT TI CLAVDIO CAESARI AVG GERMANICO.

VTIQUE QVAECVNQVE EX VSV REIP MAIESTATE DIVINA-
RVM HVMANARVM PVBLICARVM PRIVATARVMQVE RERV
ESSE CENSEBIT EI AGERE FACERE IVS POTESTASQVE SIT
ITA VTI DIVO AVG TIBERIOQVE IVLIO CAESARI AVG TIBE-
RIOQVE CLAVDIO CAESARI AVG GERMANICO FVIT.

VTIQUE QVIBVS LEGIBVS PLEBEIVE SCITIS SCRIPTVM
FVIT NE DIVVS AVG TIBERIVSVE IVLIVS CAESAR AVG
TIBERIVSQVE CLAVDIVS CAESAR AVG GERMANICVS TE-
NERENTVR IIS LEGIBVS PLEBISQVE SCITIS IMP CAESAR
VESPASIANVS SOLVTVS SIT QVAEQVE EX QVAQVE LEGE
ROGATIONE DIVVM AVG TIBERIVMVE IVLIVM CAESAREM
AVG TIBERIVMVE CLAVDIVM CAESAREM AVG GERMA-
NICVM FACERE OPORTVIT EA OMNIA IMP CAESARI
VESPASIANO AVG FACERE LICEAT.

VTIQUE QVAECVNQVE ANTE HANC LEGEM ROGATA
ACTA GESTA DECRETA IMPERATA AB IMPERATORE CAE-
SARE VESPASIANO AVG IVSSV MANDATVVE EIVS A QVO-
QVE SVNT EA PERINDE IVSTA RATAQVE SINT AC SI PO-
PVLI PLEBISVE IVSSV ACTA ESSENT.

S A N C T I O.

SI QVIS HVIVSCE LEGIS ERGO ADVERSVS LEGES ROGA-
TIONES PLEBISVE SCITA SENATVSVE CONSVLTA FECIT FE-
CERIT SIVE QVOD EVM EX LEGE ROGATIONEVE PLEBISVE
SCITO SENATVSVE CONSVLTO FACERE OPORTEBIT NON
FECERIT HVIVS LEGIS ERGO ID EI NE FRAVDI ESTO NEVE
QVID OB EAM REM POPVLO DARE DEBETO NEVE CVI DE
EA RE ACTIO NEVE IVDICATIO ESTO NEVE QVIS DE EA RE
APVD SE AGI SINITO.

This Fragment was found engraven upon Copper, in the Church of St. John de Lateran at Rome, and is now preserved in the Capitol. It is called,

³ C. 6. 23. 3.

⁴ C 6 51 1. 14.

⁵ D. 40. 1. 14.

*Lex Imperii*¹.

*Augustum Privilegium*⁴.

*Lex Augusti*⁵.

The Origin of it was this. *Augustus*, as we have formerly seen, took upon himself by different Grants of the People, at different times, the public Administration, as in the years V. C. 724. 727. 730. 731. 735.

⁶ Libb.
LI.—LIV.

⁷ Sueton. I. 84.

⁸ Id. II. 27.

⁹ Tacit. I.
Annal. init.

For which *Dion Cassius* may be consulted⁶.

*Augusto omnia Divina simul atque Humana SCto decreta*⁷.

*Morum Legumque regimen perpetuum*⁸.

*Cuncta discordiis civilibus fessa, nomine Principis, sub imperium recepta*⁹.

By the last Grant of 735, he became compleatly invested with all Civil Power, though he was Sovereign before. For 727. when he was *Cos. Septimius*, he received the Title of *Augustus*, and was declared *Legibus Solutus*. This was the Aera of the Roman Empire, and hence the *Anni Augustaei* ran¹.

¹ Censorin. c.
21. et 22.

It is of this Period possibly, that *Strabo* writes, at the Conclusion of his Work:

Αἱ δὲ Ἐπαρχίαι διήρνηται ἄλλοτε μὲν ἄλλως, ἐν δὲ τῷ παρόντι, ὡς Καῖσαρ ὁ Σεβαστὸς διέταξεν. Ἐπειτα γὰρ ἡ παρὶς ἐπέτρεψεν αὐτῷ τὴν προσασίαν τῆς ἡγεμονίας, καὶ πολέμου, καὶ εἰρήνης κατέστη κύριος. διὰ τούτων, δὶχα διεῖλε πάσαν τὴν χώραν, καὶ τὴν μὲν ἀπέδειξεν ἑαυτῷ, τὴν δὲ τῷ δήμῳ.*

The Powers, which had been granted to *Augustus* by Degrees, *paulatim*, were conferred upon his Successors at once, by one single Instrument: and the Instrument before us, is that of *Vespasian*.

² Tacit. I.
Hist. 47.

³ Id. II. Hist.
55.

⁴ Id. IV. Hist.
3.

*Adcurrunt Patres: decernitur Othoni Tribunicia Potestas, et nomen Augusti, et omnes Principum honores*².

In Senatu cuncta longis aliorum principatibus composita statim decernuntur [Vitelio]³.

*At Romae Senatus cuncta Principibus solita Vespasiano decernit, laetus et spei certus*⁴.

*It should be
urbs or patria.*

* *Provinciae autem aliae alio modo distributae erant: hodie vero, ut Caesar Augustus instituit. Cum enim Urbis ei conceisset imperii administrationem, et belli pacisque arbiter constitutus esset durante vita, terram omnem bisariam divisit, et dimidiam sibi, partem vero alteram populo assignavit.*

Διὰ ταῦτα ἡ Γερουσία δῆμαρχον τε αὐτὸν [Augustum] διὰ βίαν εἶαι ἐψηφίσθη, καὶ χρηματίζειν αὐτῷ περὶ ἑνὸς τινος ὅτε ἂν ἐβελήσῃ καθ' ἐκάστην βελὴν, καὶ μὴ ὑπαεύσθῃ, ἔδωκε, τὴν τε ἀρχὴν τὴν ἀνθυπάου ἰσαεὶ καθαπάξῃ ἔχειν, ὥστε μήτε ἐν τῇ εἰσόδῳ τῇ εἰσῷ τε πωμψηρε καθίσθαι αὐτὴν, μήτ' αὐτὴν ἀνανεῖσθαι καὶ ἐν τῷ ὑπηκόῳ τὸ πλεῖον τῶν ἐκαστοχόθι ἀρχόντων ἰσχύειν ἐπέτρεψεν. ἀφ' ἧς δὴ καὶ ἐκεῖν καὶ οἱ μετ' αὐτὸν αὐτοκράτορες EN NOMΩI ΔΗ ΤΙΝΙ τοῖς τε ἄλλοις, καὶ τῇ ἐξουσίᾳ τῇ δημαρχικῇ ἐχρήσαντο.*

⁵ Dion Cassius LV. 32.

This Instrument about the Reign of the *Antonines*, when the Romans became more reconciled to the name of *King*, was called *Lex Regia*: Though the Emperors (it is said) had been used to that name before. For which these Passages are quoted⁶.

Some of which prove nothing: and others rather the contrary; as, for instance, that of *Suetonius*,

⁶ Joh. XIX. 15. Acts XVII. 7. Pet. 1. Epist. II. 17. Cic. III. Offic. 21. Sueton. I. 80.

Subscripsere quidam L. Bruti statuae, VTINAM VIVERES. Item ipsius Caesaris statuae,

BRVTVS QVIA REGES EIECIT CONSVL PRIMVS FACTVS EST:
HIC QVIA CONSVLES EIECIT REX POSTREMO FACTVS EST.

Where the Appellation, *REX*, carries more of Contumely or Acrimony with it, than Honour or Dignity: as in this place of *Martial* also, which is applied to *Nero* with some degree of Bitterness,

⁷ Spectac. II. 3.

Invidiosa feri radiabant Atria Regis.

There is a remarkable Period in a Speech of *Mithridates*, recorded by *Justin*⁸, where that Prince is inveighing against the Romans:

⁸ XXXVIII. 6.

Quippe non delicta Regum illos, sed vires ac maiestatem insequi—Hanc illos Regibus omnibus legem odiorum dixisse. Cetera.

Nor can I be perswaded, that *Statius*⁹ could write to *Domitian*,

⁹ 4. Silv. I. 46.

——longamque Tibi, Rex magne, *Juventam*,

as Mr. *Markland* upon the place very justly concludes; whose Notes will give a light to the present Inquiry.

Θαυμασὸν ἦ, ὅτι τοῖς ἑρῶσι τὰ τῶν βασιλευσάντων ἐπομένοντες, ΤΟΥΝΟΜΑ ΤΟΥ ΒΑΣΙΛΕΩΣ, ὡς κατὰ λυγρὴν τῆς ἐλευθερίας, ΕΦΕΤΤΟΝ[†].

[†] Plutarch. in Anton. Tom. V. pag. 77.

* Propter haec Senatus Augusto hos honores decrevit, ut Trib. pl. perpetuus esset: ut, quoties Senatus haberetur, etiamsi Consulatum non gereret, jure unius relationis de quacunque re vellet, uteretur: ut Procos. imperium simul semelque haberet perpetuum, neque id intra Potestatem venienti deponere, neque unquam renovare opus esset: ut major ipsi in singulis Provinciis quam Praefectis earum semper esset potestas. Inde exortum est, ut Augustus, quique eum secuti sunt Imperatores, lege quadam, cum reliquis hisce, tum Tribunitia potestate uterentur.

† Mirandum sane erat, eos, qui re ipsa dominatum ferebant, regis nomen, ut dissolutionem libertatis, defugisset.

When

* D. 1. 4. 1. pr.

When *Vlpian* * writes upon this Law, he uses this expression,

Quod Principi placuit, legis habet vigorem : utpote cum Lege Regia, quae de imperio ejus lata est, Populus EI ET IN EVM omne suum imperium et potestatem conferat.

Some think, that by the words *Ei et in Eum* is meant, that the People transferred all their Rights and Powers upon the Prince, *Abdi-*

⁹ Govean. II. *cative* or *Privative*, reserving nothing to themselves⁹. Though others Var. Lect. 30. understand it *Cumulative* only : transferring the Exercise in great measure upon him, but not without a power of Resumption. Another

¹ XV. Observ. Sense of *Ei et in Eum* is given by *Cujacius*¹. Possibly nothing more is ^{30. Add.} meant, than a Vigorous and Full Expression to make the Conveyance ^{D. 2. 1. 14.} as absolute as possible. The Civil Law chuses that Plenitude. So ^{36. 1. 1. 2.}

² Herald. A- the Lawyers write²,

nimadv. in

Salmas p.

101.

Brummer. ad

L. Cinciam.

p. 29.

Do Lego.

Pañtum Conventum.

Domum Munus.

Jus Vtendi Fruendi.

Διαθῆκαι Αντίγραφα.

So in this Instrument,

AGERE FACERE IVS POTESTASQUE SIT.

MAGISTRATVM POTESTATEM IMPERIVM CVRATIONEMVE.

So our Law also :

Right, Title and Interest.

Habendum Tenendum.

Or

To Have and to Hold.

As in this very Form before us

HABEATVR SERVETVR.

CVSTOM.

C U S T O M.

J. 1. 2. 3.

1. 2. 9.

D. 1. 1. 6. 1.

1. 3. 32.——40.

C. L. VIII. Tit. 53.

And the Commentators.

Cujac. XX. Observ. 1.

Connan. 1. Comment. f. C. 10.

Raevard. de Auctor. Prud. C. 16.

Menoch. de Arb. Jud. Lib. 2. Cas. 83.

CUSTOM is thus described in those Laws of the Digests, etc. which are quoted at the Head of this Section.

*Jus moribus constitutum.**quod sine scripto venit.**moribus inductum.**quod rebus ipsis et factis Populus probavit.**per annos plures confirmatum.**Tacita Civium Conventio.**Diuturni mores utentium consensu comprobati.**Diuturna et inveterata Consuetudo.*

To which may be added the following:

*Id, quod sine Lege Vetustas comprobavit.**Consuetudo est Jus non scriptum, per continuam actuum frequentiam et diuturnum temporis spatium tacita Populi voluntate inductum.**Tacitus illiteratusque Consensus¹.*Νόμος ἐστὶν ἔγγραφος Συνθήκη δὲ ὁ ἀγραφος Νόμος².It is not of this, but of Natural Law, that Seneca writes³.*Quaedam Jura non scripta, sed omnibus scriptis certiora.*

And Tertullian,

*Ante Legem Moyse scriptam in tabulis lapideis, Legem fuisse contendo non scriptam, quae naturaliter intelligebatur, et a patribus custodiebatur⁴.*I shall, in my Considerations upon Custom, be guided by these Words of Julian⁵.*Inveterata Consuetudo pro lege non immerito custoditur, et hoc est Jus, quod dicitur moribus constitutum. Nam cum ipsae Leges nulla alia ex causa nos teneant, quam quod judicio populi receptae sunt, merito et ea quae sine ullo scripto populus probavit, tenebunt omnes.*

H h

Nam

¹ Gell. XI. 18.² σκ. Sophocl. Ajac ver. 350. Add. *Pit. Fab.* in. not. ad *Princip. Vipi-* ani, apud Meerman. Thes. J. C. Tom. VII. pag. 741.³ I. Controv. 1.⁴ Adv. Judaeos. Edit. Rigalt. pag. 206.⁵ D. 1. 3. 32. 1.

CUSTOM.

Nam quid interest, suffragio populus voluntatem suam declaret, an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut non solum suffragio Legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.

And, according to his Division, examine

1. The Nature, Power and Principle of Custom, or unwritten Law.
2. The Reasons, upon which it is founded.
3. Deduce some Corollaries from those Reflections in regard to its Efficacy and Operations.

I.

By Custom then is meant a long and continued Practice: a Law not written, or expressed; but the Will and Sense of a People gathered from a long and invariable Continuance in one kind of Proceedure.

Though the Lawyers commonly agree to distinguish *Law and Custom* by *Jus Scriptum* and *Non Scriptum*, it must however be remember'd, that the Formal Ratio does not consist in the One being written, and the Other not. For

1. There may be Unwritten Law, which yet shall not be Custom.
2. There may be Custom, and yet not Unwritten.

1. The Civil Laws of the Spartans were never committed to Writing. Nay, it was a Law among them, that they should not. *Justinian* therefore is often corrected, for bringing his Instance of *Law and Custom*, from the Manners of the Athenians and Lacedaemonians. The Laws of Sparta were as properly Laws, as those of Athens. For the Will of the Sovereign was the Authority by which they prevailed. Their Constitution or Appointment was one precise and determinate Fact. Their Date also was well ascertained and notorious. And last of all, they gather'd not their Strength from Longaevity and un-interrupted Practice, but were as authoritative in their first Period, as in the last. All which Considerations are not reconcileable to our Ideas of Custom. The Laws of the Spartans were not committed to Brass or Stone, but engraved on the Tables of their Hearts: possibly because that Lawgiver thought the Spirit of his Constitution better supported by having it remember'd, than by having it consulted: imagining *Literis confisos minus memoriae studere: et praesidio literarum, diligentiam in perdiscendo ac memoriam remittere*¹, as was said of the Gauls upon no very dissimilar Occasion.

¹ Caesar VI. de B. G. 14.

2. On the other hand: Customary Laws, when reduced into Writing, as the *Grand Cusumier of Normandy*, the *Feudal Laws*, and others, are nevertheless Custom, and do not change their Essence. When We consider the Law of England, it is sometimes called the *Common Law*, as distinguished from the *Civil Law*. Sometimes *Common Law* stands opposed to *Equity*. But the exact Notion of the *Common Law of England* is that Conception, by which it differs from *Statute Law*, or Acts of

of Parliament. The last of which are the Νόμι ἐγγράφοι; * the other, the ἄγραφοι, † the long-established Customs of our Ancestors. Now if these were drawn up in Writing (as many Parts of it frequently are) collected, printed, published and commented upon, it would not therefore become Statute-Law, but remain Common-Law still. A Nuncupative Will, or *Testamentum ore prolatum* (by which it differs from other Wills) when reduced to Writing, as it ought to be, and generally is, remains still a Nuncupative Will. So in respect to Law and Custom, We regard the Authority, not this accidental Circumstance. *Non valet, quia scriptum est*, says a considerable Civilian, *valebat enim antequam scriberetur*.

The true, exact and essential Difference therefore between Law and Custom is the Authority which enacts them. The Will of the Prince, the express Direction of the People, or the proper Power of Legislation, wherever residing, is what determines the One: and the *Tacita Civium Conventio* ‡, joyned with a long and constant Exercise, is the Foundation of the Other. This therefore speaks itself in public Practice: and the former is signified by some other method of Declaration. Which Declaration being generally (not necessarily) in writing, it came to pass, that γράφειν νόμους † was used for that Declaration, or that Promulgation, be it of what kind soever. The Rule of Law is: *Quocunque modo Principis Voluntas Subditis innotescit, eodem etiam modo Jus scriptum nascitur*. If an Herald was to proclaim it, it would be nevertheless *Jus Scriptum*. Indeed the Imperial Constitutions § look upon that as the most satisfactory Promulgation. And this is, or should be, the Practice in England: viz. The Statutes which pass in a Session of Parliament are read or proclaimed in the next County Court. But the other is so much the general way, that *Plutarch* applies the very Terms (γράφειν νόμους §) to *Lycurgus*, and yet in his Life of that Lawgiver informs us, that it was one of his Laws, μὴ χρῆσθαι νόμοις ἐγγράφοις ||.

The Law of Custom therefore thus constituted is called by one of my Authors *Jus moribus constitutum*. And again ¶, *De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est*. So when *Plato* † divides Law into γεγραμμένον** and ἄγραφον††, by the last he tells us, that he means, τὸν κατὰ ἡθὴ γενόμενον ‡‡. And so great is the Connection between ΕΘΟΣ §§ and ΗΘΟΣ |||, that *Plutarch* § de Educat. writes thus,

Καὶ γὰρ τὸ Εἶδος ἐστὶ πολυχρόνιον, καὶ τὰς ΗΘΙΚΑΣ ἀρετὰς ΕΘΙΚΑΣ ἂν τ.ς λέγη, ἢ καὶ ἂν τι πλεονεκτήσῃ δόξει. ***

* *Leges scriptae.* † *Non scriptae.* ‡ *Scribere leges.* § *Scribere leges.* || *Non uti legibus scriptis.* ** *Scriptam.* †† *Non Scriptam.* ‡‡ *Moribus constitutam.* §§ *Consuetudinem.* ||| *Mores.* *** *Nam Consuetudo est Res diuturna, ideoque si quis virtutes morales, virtutes Consuetudinis vocaret, per me licebit.*

Other Copies have ΗΘΟΣ : both (so far) right, for I would recommend Καὶ γὰρ τὸ ΗΘΟΣ ΕΘΟΣ ἐστὶ πολυχρόιον.*

² de fera Numinis vindicta.

Plutarch again²,

Σκόπει δὲ ὅτῃ μεταβολαὶ γεγόνασιν εἰς ΗΘΟΣ ἀνδρῶν καὶ βίων ἢ καὶ τρόπων. ἀνομάσθη τὸ μεταβάλλον αὐτῶν ἡθός, ὡς πλείοσι αὐτῶν ἐνδύεσθαι τὸ ΕΘΟΣ, καὶ κρατεῖ μάλιστα καταπτόμενον. †

Praeterea quae legibus cauta sunt, quae persuasione, etiamsi non omnium hominum, ejus tamen civitatis aut gentis, in qua res agitur, in mores recepta sunt: ut pleraque in Jure, non legibus, sed moribus, constant.

¹ Quintilian. v. 10.

So that *Muretus* had no reason to blame those, who, upon these principles of Etymology, and upon the reasoning of the Greek Writers, applied to this occasion the words of *Aristotle*, Τὸ ἡθός ἐξ ἔθους περιγίγνεται. ‡

It is necessary that this Custom, in order to gain the Authority of Law, should be of some Continuance. *Inveterata Consuetudo*. *Julianus*. *Diuturna Consuetudo*. *Vlpian*. *Longa Consuetudo*. *Hermogenianus*. *Vetustas* ² D. 39. 3. 2. *semper pro Lege habetur*, are the words of *Paulus*¹. But what shall be called *Vetustas*, what shall make Prescription, is very often the business of Custom itself, and sometimes the act of the Judge, to determine.

Having mentioned *Prescription*, it may be proper to observe, that it differs something from *Custom* in the English Law. In as much, as *Custom* is *Local*, and applicable to what has prevailed, time out of mind, in such or such a District; whereas *Prescription* on the other hand is always *Personal*, a Title which one particular Person may have acquired to any Right or Property, by long usage, and general acquiescence, which he is to plead against the Disturber. And indeed much of the same nature is Prescription in the Civil Law, a personal Right gained by long and un-interrupted Possession of a Thing immoveable, for if it be in *Re Mobili*, it is by Civilians rather called *Vsucapio*.

II.

I come, in the order I enjoined myself, to inquire upon what Principles the Authority of Custom is founded. And that is the Will, the Pleasure, and the Satisfaction of those that come into it. Though all Law be a Contract, as I have endeavoured to prove above³, and no body consequently obliged but by his own Consent, yet is that Consent more apparent in the general Practice, than in the positive Institutions, of any People whatsoever.

The Power therefore and the Efficacy of Law and Custom is the same. They differ only in the manner of making the thing Public.

* *Mores enim Consuetudo est diuturna.*

† *Considera vero quam multorum hominum mores et vita, fuerint mutata: qua occasione Graeci mores [τρεπεις] a mutando, et [ἡθον] a consuetudine nominant, quae in hac re semel adhibita plurimum potest.*

‡ *Mores Consuetudine comparantur.*

Quid interest, says Julianus⁴, suffragio Populus voluntatem suam de- ⁴ D. 1. 3. 32. 1.
claret, an rebus ipsis et factis?

Nay, the Advantage is rather on the side of Custom :

Immo magnae Auctoritatis hoc Jus habetur, quod in tantum probatum
est, ut non fuerit necesse scripto id comprehendere⁵. ⁵ D. 1. 3. 36.

To which we may add the words of *Aristotle*⁶. ⁶ III. Polit. 16.

Κυριώτεροι καὶ περὶ κυριωτέρων τῶν κατὰ γράμματα νόμων, οἱ κατὰ τὰ ἔθνη
εἰσὶν*.

III.

In regard to the Efficacy of Custom :

1. The Power of all Law is from the *express*, and that of Custom,
from the *supposed*, Will of the Legislator..

2. The Efficacy of Custom is to *stand for* Law, and operate like it.
For with that Caution the Lawyers write.

De quibus causis scriptis legibus non utimur, id custodire oportet, quod
moribus inductum est⁷.—Pro lege non immerito custoditur⁸.—Pro ⁷ D. 1. 3. 32.
jure et lege observari solet⁹.—Vim legis obtinere¹.—Legem imitan- ⁸ Ibid. § 1:
tur².—Leges ipsas Consuetudo imitatur³.—Legis vicem obtinere⁴. ⁹ l. 33. eod.

Consuetudo autem etiam in civilibus rebus pro lege suscipitur, cum ¹ l. 38. eod.
deficit Lex⁵. ² J. 1. 2. 9.

3. As Custom is supposed to be something which has prevailed *sine* ³ C. 8. 53. 3.
Promulgatione, Disputes about Custom are Disputes about Fact. Facts ⁴ *ibid.*
must be proved ; and the Proofs of this are to be made out *ex Actuum* ⁵ *Tertullian.*
uniformium frequentia, et diuturnitate temporis. That is, the Antiquity ⁶ *de Cor. Mil.*
must be supported, and so must also the Uniformity, the Continuance
or Un-Interruption. *Antiquitus probata et servata tenaciter*, are the
Words of *Leo* and *Anthemus*⁶. And thus we come at the Certainty ⁶ C. 8. 53. 3.
of it.

4. But besides all this, it must be grounded in Reason, to operate like
Law. Nay it is supposed to be Reason itself, that speaks through Custom.

Nam et Consuetudo praecedens, et Ratio, quae consuetudinem suavit,
custodienda est⁷. ⁷ *ibid.*

Nec differt scriptura an ratione [Lex] consistat, quando et Legem Ra-
tio commendat⁸. ⁸ *Tertulliana.*

Therefore no Custom can prevail against Right Reason, and the ⁹ *ibid.*
Law of Nature.

Male adinventae, malaeque consuetudines, neque ex longo tempore, ne-
que ex longa consuetudine confirmantur⁹. ⁹ Nov. 134. 1.

* *Majorem auctoritatem habent, et ad res graviore spectant, Leges quae ex moribus et
consuetudine descendunt, quam Leges scriptae.*

C. 8. 53. 2. *Consuetudinis ususque longaevis non vilis auctoritas est: verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem¹.*

And as it derives all its Authority from the [supposed] Consent of the Law-giver, it can have no greater Authority, than what he could give it.

Or, it may be apprehended thus: The Will of the People is the Foundation of Custom. But if it be grounded not upon Reason, but Error, it is not the Will of the People. *Quoniam non velle videtur, qui*

² D. 1. 3. 39. *erravit.* So Gelsus².

Quod non Ratione introductum est, sed errore primum, deinde consuetudine obtentum est, in aliis similibus non obtinet.

³ D. 1. 3. 37. 38.

5. Custom is a good Interpreter of Law³.

6. Custom is then most prevalent, when it is established by a Legal Decision.

Cum de Consuetudine Civitatis vel Provinciae confidere quis videtur, primum quidem illud explorandum arbitror, an etiam contradicte aliquando iudicio Consuetudo firmata sit⁴.

⁴ D. 1. 3. 34.

⁵ Leunclav. II. Notat. 3.

For so we must read, not *contradicto*, as the Copies have it⁵.

7. Custom can set aside a former Law. This has been the Subject of much dispute. And that Text, which seems to establish the contrary doctrine, *verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem⁶*, has been discreetly examined by Ger. Noodt⁷.

⁶ C. 8. 53. 2. ⁷ Comment. ad Dig. p. 16.

No special Custom indeed can abrogate a general Constitution: but the Custom must be at least as general, as the Law itself was. And if this Doctrine be true, as it is maintained by the best Writers, it will appear with what Reason I formerly urged the necessity of considering all positive Law as the Creature of Consent and mutual Covenant, let the Direction of it proceed from what Hand it may.

8. Custom therefore upon the foregoing Principles may be set aside by a new Law—by the Revival of an old one—or lastly by Desuetude or contrary Practice.

PERSONS.

OMNE Jus, quo utimur, vel ad Personas, pertinet, vel ad Res, vel ad Actiones¹. For, according to *Wesembecius*, Jus redditur Personis de Rebus per Actiones, i. e. Judicia. ¹J. 1. 2. ult. D. 1. 5. 1.

<i>Persona</i>		Lib. I. Tit. III.—the End.
<i>Res</i>	} considered in the Institutes	Lib. II.
		Lib. III.
<i>Actiones</i>		Lib. IV. Tit. I.—V.
		Lib. IV. Tit. VI.—the End.

The Title in the Institutes, *De Jure Personarum*, corresponds to the Title in the Digest, *De Statu Hominum*.

For *Persona* is a Character or Capacity, *Homo cum Statu*, a Man under particular Circumstances, Conditions and Relations: and *Jus Personarum* are those Rights and Considerations which attend Persons so circumstanced and so situated.

Persona in the best Writers, it is said, first signified the Mask in Dramatic Performances, expressive of the several Characters in it. *Suetonius*, writing of *Nero*²,

Tragoedias cantavit personatus, Heroum Deorumque, item Heroidum ac Dearum personis affectis ad similitudinem oris sui et feminae, prout quamque diligeret.

(Though others, and not without reason, think, that the Mask or *Persona* was so called from the *Person*, or Party represented, as in the Greek *Προσωπεῖον* from *Πρόσωπον*³.)

But *Persona*, whether the Stage had it originally, or only borrowed the Expression, came to be frequently applied to that Part or Character, which every Man acted upon the Stage of Life. So *Lactantius*: *Alia est Persona Domini, alia Judicis*. So *Cicero*, whose business was totally confined to reducing bad Citizens, *Catiline*, *Clodius*, &c. writes,

*Vt mea Persona semper ad improborum Civium impetus aliquid videretur habere popolare*⁴.

And again,

*Nisi vero me unum vis ferum, praeter ceteros, me asperum, me inhumanum existimari.—Hanc mihi Tu, si propter res meas gestas, imponis in omni vita mea personam, Torquate, vehementer erras. Me Natura misericordem, Patria severum: crudelem nec Patria, nec Natura esse voluit. Denique istam ipsam personam vehementem et acrem, quam mihi tum tempus et Resp. imposuit, jam voluntas et natura ipsa detraxit*⁵.

² § 21. Add. Fest. v. PERSONATA FABULA. Serv ad Virg. II. Georg. 387. Bas. Faber. v. PERSONA. ³ Pitiscus in v. PERSONA.

Attic. 11.

⁵ pro Sylla.

Caesar § 3.

⁶ Id. VI.
Fam. 6.

Caesar nunquam nisi honorifice Pompeium appellat : at in ejus Personam multa fecit asperius⁶.

Persona in the Relation He stood to him, as an Enemy and Competitor for Power. If this be the Sense of the Place.

It came at last to be confounded with *Homo* : as when *Celsus*, the Physician writes, *Neminem periclitari velle in splendida Persona*.

But there is a Difference between *Homo* and *Persona*. *Homo* is the more general. For every *Persona* is *Homo* : but every *Homo* is not *Persona*⁷. I mean in the Eye of the Civil Law ; where a Slave is said to be ἀπρόσωπος⁸, because He has no Rank (nor even Existence) in a Civil Sense :

⁷ Calvin. v.
PERSONA.

⁸ Theophilus,
J. 3. 18. pr.
Harmonop.
VII. 6.

⁹ D. 50. 17.

32.

¹ Cassiodor.

Var. VI. 8. 7.

² D. 1. 5. 14.

³ Juvenal. VI.

222.

Quod attinet ad Jus Civile, Servi pro nullis habentur⁹.

Personam legibus non habentes¹.

Cuicunque contingit in Corpore Humano Mens Humana, Homo dicitur.

Therefore Monsters alone are excluded or denied that Appellation :

And the Woman in the Poet argued very unreasonably, when She said¹.

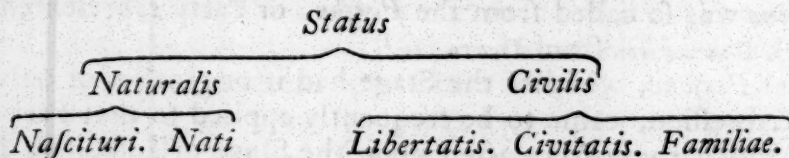
O Demens ! ita Servus Homo est ?

For that Name was not refused him, as We shall see presently. This therefore is *Homo*.

PERSONA est Homo, Statu indutus. And as a Man's State or Condition may be either Natural or Civil, it follows that in a Natural Acceptation, a Slave, as he is *Homo*, may be said to bear *Personam Naturalem*⁴.

⁴ D. 2. 7. 3. pr.
50. 16. 215.
50. 17. 22. pr.
50. 17. 32.

The great Distinction therefore of Mankind stands thus :



That is, a Man's Condition, State or Quality, is either what He received from Nature, or some arbitrary Disposition of Man.

Nascituri are the *Fructus* or *Spes Ventris*, and have respective Rights and Considerations. *Nati* may be considered in regard to SEX or AGE.

In a Civil Consideration, with regard to *Libertas*, Men are divided into Masters and Slaves : to *Civitas*, into Citizens and Strangers : to *Familia*, into *Patres fam.* and *Filios fam.* All which differ in their Rights and Relations.

⁵ D. 35. 2. 9. 1.
29. 2. 84.
37. 6. ult.

⁶ J. 1. 13. 4.
See D. 1. 5. 7.

1. 5. 26.
5. 4. 3.

With regard to *Nascituri*, or Children in the Womb, they are often in the Law Books called *Ventres*⁵. And the Rule of Law concerning them is, that with regard to any Benefit or Emolument, they are considered as already born. *Qui nasci speratur, cum de ipsius Jure quaeritur, pro Superstite est*⁶.

Hence

Hence it has had a Place in all Laws whatsoever,

*Vt Praegnantis Tortura vel Supplicium differatur donec Partum fuderit*⁷.
*Neque mortua praegnans ante humetur quam Partus ei excidatur*⁸.

But this was the Tenderneſs of the later Law. For an Embryo, upon Stoical Principles, to which the Roman Lawyers long adhered, was neither Man nor Animal, but *Portio Mulieris et Viſcerum*, μέρος τῆς γαστρὸς, & ζῶον, ὡς περ οἱ καρποὶ μέρος τῶν φυτῶν⁹. * And during that Perſuaſion, the Parents had a very extravagant Power over theſe Conceptions. For, in regard to the Mother, Abortion went unpuniſhed, till a Conſtitution of *Severus* and *Antoninus* reſtrained it¹. And, on the Father's ſide, excluſive of the Parental Authority, This gave riſe to the barbarous Cuſtom of Antiquity, of expoſing, ſtrangling, etc. their Children; which prevailed down to the Emperors *Valentinian*, *Valens*, and *Gratian*². I ſay, it is to this Principle, and theſe Perſuaſions it was owing. For all Births were conſidered as Embryos, *antequam Pater decreviſſet tollere*³.

Be it obſerved, that the Tenderneſs of which I was ſpeaking, and the Indulgence granted to *Poſt-Nati*, could not be extended to any one beſide. They could not benefit others⁴. And the Reaſon is plain, becauſe this is a perſonal Privilege, and perſonal Privileges do never *egredi perſonam*⁵.

For inſtance:

*Matres tam Ingenuae, quam Libertinae, Cives Romanae, ut jus liberorum conſecutae videantur, et quater peperiſſe ſufficiet, dummodo vivos, et pleni temporis pariant*⁶.

We come in the next Place to conſider *Natos*: and that with reſpect to SEX and AGE.

S E X.

The Roman Law, with regard to Sexes, has placed the Male in a much better Condition than the Female⁷. And in this reſpect it has not been particular. When I ſaid a better Condition, I meant, *ratione Dignitatis*. For in the Exceptions or Indulgencies granted to the other Sex upon account of the real Imbecillity of their Nature, and the ſuppoſed one of their Judgment, they may be looked upon frequently, as better circumſtanced.

*Minoribus XXV. annis jus ignorare permiſſum eſt, quod et in feminis in quibusdam cauſis propter ſexus infirmitatem dicitur*⁸.

And upon this Suppoſition was grounded the *SCtum Velleianum*, by which Women were reſtrained from being Sureties, and becoming bound for other People's Engagements.

* *Pars Ventris, non Animal, quemadmodum Fructus partes ſunt Plantarum.*

⁷ D. 1. 5. 18.

^{48.} 19. 3.
 Clem. Alex.
 andr. II.
 Strom.

Aelian. V. H.
 V. 18.

Plutarch. de
 ſera Numinis
 vindicta.

Philo Judaeus
 π. φιλαργεαπ.

⁸ D. 11. 8. 2.
 Synopf. Baſil.
 16. Tit. 2. c. 3.

⁹ Plutarch.
 Placit. Philo-
 ſoph. V. 15 et
 16.

Edm. Merill. I
 Obſerv. 16.

Amaya III.
 Obſerv. 1. 2.

Heinecc. ad
 Pandect. L. 1.
 Tit. 5. § 124.

¹ D. 47. 11. 4.
 48. 19. 39.

² Noodt. de
 Partus Expo-
 ſitione.

³ Terent.
 Andr. I. 3. 14.

⁴ D. 1. 5. 7.
 50. 16. 231.

⁵ D. 24. 3. 13.
 Abovep. 235.

⁶ Jul. Paul.
 Sentent. IV. 9.
 § 1.

D. 1. 5. 9.

1. 9. 1.

50. 17. 2.

⁸ D. 22. 6. 9. pr.

⁹D. 16. 1. 1. pr.

¹l. 1. § 1. eod.

²D. 48. 5. 38.

2. Add. Nov.

12. 1. 134. 10.

³D. 16. 1. 1. 1.

Add. 50. 17. 2.

Hoppius ad

Instit. 2. 10. 6.

⁴Cic. pro

Flacco, § 30.

⁵Budaeus

Comment. L.

Gr. p. 44. 45.

Pfeiffer. Gr.

Antiqq. IV. 5.

Salmaf. de M.

V. p. 165.

Gravin. de

LL. et SCtis.

Meurs. III.

Attic. Lect. 24

⁶Aeschin. c.

Timarch. p.

19. Edit. Nov.

⁷Dio. Chry-

solom. Orat.

LXXV.

Meurs. II.

Them. Attic.

9.

Salmaf. de M.

V. p. 425.

Petit. LL. At-

tic.

⁸Orat. c.

Steph. Jéridou.

6. Edit. Paris.

n. 29.

⁹Odyss. A. 291

¹Otto Dissert.

IV. Cap. 1.

§ 6. Add. De-

mosth. c.

Neaer. p. 582.

Edit. Cantab.

Menag. J. C.

Amoenit.

c. 25.

Isaeus, pag.

XXXVIII. 7.

10. Edit. H. S.

Liv. XXXIX.

9.

Cujac. VII.

Observ. 11.

Heinf. XVIII.

Exerc. 2.

D'Arnaud. I.

29.

*Velleiano SCto plenissime comprehensum est, ne pro ullo Feminae intercederent*⁹.

*Nam sicut moribus Civilia Officia adempta sunt feminis, et pleraque ipso jure non valent, ita multo magis adimendum eis fuit id officium, in quo non sola opera nudumque ministerium earum versaretur, sed etiam periculum rei familiaris*¹.

This SCtum has furnished two Titles in the *Corpus Juris Civilis*, viz.
Dig. Lib. XVI. Tit. I.
Cod. Lib. IV. Tit. XXIX.

And besides all this, the Sex was more tenderly considered in penal Laws :

*Quare Mulier tunc demum eam poenam, quam Mares, sustinebit, cum Incestum jure gentium prohibitum admiserit : nam si sola juris nostri observatio interveniet, mulier ab incesti crimine erit excusata*².

However, Women at Rome were removed from all Magistracies and Civil Employments whatsoever, by the Custom of the Country³, and were under a kind of perpetual Guardianship ; of which take the following Account.

In Greece the Woman could scarce do one single Act without the Intervention of a Tutor or Guardian⁴, who was called Κύριος⁵ (which was also the ordinary Word for a Guardian in general⁶) : could not contract *πέρα μεδίμνε κριθῶν*⁷. * This Guardian was generally the next Relation, nay, what is remarkable in that Constitution, Her own Son, if He was of Age, as We learn from *Demosthenes*⁸.

Οὐκ ἔν ὁ μὲν νόμος κελεύει τὰς παῖδας ἡβήσαντας κυρίας τῆς μητρὸς εἶναι. †

Thus the Advice given by Minerva to Telemachus, on a Supposition that Ulysses was dead :

Σῆμα τέ οἱ χεῦσαι . . .
. . . καὶ ἀνέρι μητέρα δῆναι⁹. ||

When a Woman was cited into Court there, the Words of the Proclamation were :

Η ΔΕΙΝΑ ΚΑΙ Ο ΚΥΡΙΟΣ¹. §

* *Ultra medimnum bordei.*

† *Lex igitur jubet filios puberes matris esse Tutores.*

|| But if his Soul hath wing'd the destin'd Flight,
Inhabitant of deep disastrous Night,
Homeward with pious Speed repass the Main,
To the pale Shade funereal Rites ordain :
Plant the fair Column o'er the vacant Grave,
A Hero's Honours let the Hero have.
With decent Grief the royal Dead deplor'd;
For the chaste Queen select an equal Lord. POPE.

§ N. N. Ejusque Tutor.

Hence

Hence also, agreeable to a Ritual, which still prevails with us, the Woman to be married was, in the very Words of our Language, *Given away*:

Ζεὺς ἡγάγησε, καὶ ΔΙΔΩΣ' ὁ Κύριος¹.*

Hence lastly, We find at the Head of a Will, that was made by a Grecian Woman, and which has been often published², the following Words:

ΕΠΙ ΕΦΟΡΩΝ ΤΩΝ ΣΥΝ ΦΟΙΒΟΤΕΛΕΙ
ΤΑΔΕ ΔΙΕΘΕΤΟ ΝΟΟΥΣΑ ΚΑΙ ΦΡΟΝΟΥΣΑ ΕΠΙΚΤΗΤΑ
ΓΡΙΝΝΟΥ ΜΕΤΑ ΚΥΡΙΟΥ ΥΠΕΡΕΙΔΟΥΣ ΤΟΥ ΘΡΑ
ΣΥΛΕΟΝΤΟΣ †——

And so it stood with the Romans:

*Mulieres omnes propter infirmitatem consilii Majores in Tutorum potestate esse voluerunt*³.

*Ipse nunquam auderet judicare, deberi Viro dotem, quam Mulier nullo Auctore dixisset*⁴.

*Vos in Manu et Tutela, non in servitio debetis habere feminas*⁵.

*Majores nostri nullam ne privatam quidem rem agere feminas sine Auctore voluerunt, in manu esse Parentum, Fratrum, Virorum*⁶——

*Mulieres damnatas, Cognatis, aut in quorum Manu essent, tradebant, ut ipsi in privato animadverterent in eas*⁷.

The *Mulierum Tutela*, was either *Pupillaris* or *Perpetua*.

The *Pupillaris* did not differ from the ordinary Guardianship, which was common to both Sexes: The *Perpetua* was peculiar to This⁸.

It was indeed properly called *Perpetua*. For it did not determine, even under Coverture, except in that kind of Coverture only (for That was various among the Romans) where the Wife did *convenire in manum Mariti*, was *in manu et mancipio Mariti*, and consequently was in all respects *Filiafam*. In which case, and in which case only, this *Tutela*, that We are speaking of, did *transire in Tutelam Maritalem*. In all other Instances She continued under the same Guardianship, as before. Whence we find⁹.

SIBI CONIVGI ET TVTORI SVO.

But this perpetual Tutelage wore away in time, both by the *Lex Julia et Papia Poppaea*, which, under *Augustus*, liberabat a *Tutela Ingenuas, quae ter; et Libertinas, quae quater peperissent*¹; and by extending the

¹ Euripid. I. phigen. in Aul. ver. 703. See Hooker's Eccl. Polit. V. § 73.

² viz. by Gruter. Montfaucon. Muratori. Maffei.

³ Cic. pro Mur. ren. § 12.

⁴ Id. pro Cecin. § 25.

⁵ Liv. XXII. 4.

⁶ Id. XXXIV.

⁷ Id. XXXIX. 18.

⁸ Heinecc. Antiq. Rom. ad Instit. I. 13. 17. seqq.

⁹ Gruter. DLII. 22.

¹ Dion Cassius LVI. 10.

Vlpian. Frag. XXIX. 2. et 3. Pariat. 15. Heinecc. ad d. 1.

* Jupiter desponsavit et dat in matrimonium.

† Sub Ephoris Phaeotele et Collegis haec testamento constituit mentis compos Episteta Grinni F. simul cum Auctore Hyperide Thra-syleontis F.——

Grants of that Law to those who had fewer Children, nay even to the

² Dion. LV. Barren and Childless ¹.

².

Plin. II.

Epist. 13. VII.

26. X. 95.

Paul. Sentent.

IV. 9. 26.

³ Consult Gothofred. ad

D. 22. 5. 18.

and 28. 1. 20.

Ruald adPlu-

tarch. in Nu-

ma. Cujac.

VII. Obf. 16.

⁴ Ambros. in

lib. Quæst. V.

et N. T.

⁵ in Poplic.

p. 221. Edit.

Bryan.

⁶ J. 2. 10. 6.

Some have imagined, that, upon account of the Impotence of the Sex, and the Frailness of their Understanding, their Testimony was never admitted in Courts of Judicature ³.

Mulierem constat subiectam dominio Viri esse, et nullam auctoritatem habere. Nec docere potest, nec testis esse, nec fidem dare, nec judicare⁴.

And this is partly countenanced by a Passage in *Plutarch* ⁵, where a Vestal Virgin, upon some signal Service, εἶχε τιμὰς μεγάλας, ἐν αἷς ἦν καὶ τὸ μαρτύριον αὐτῆς δέχεσθαι, ΜΟΝΗΣ ΓΥΝΑΙΚΩΝ. *

It is certain, that in the Roman Law, they could not be Witnesses to a Will ⁶. But that proceeded not from any supposed Incapacity or Frailty of Understanding, but because the Sex was excluded those Solemnities, where Wills were made, *Comitiis interesse non poterant*. And the Rule of Law accordingly is, *Quotiescunque Testimonii - dictio est Solemnitatis, toties Femina non potest esse Testis*: But where their Testimony was a Matter of Evidence, *Quotiescunque Testimonii - dictio Veritatis est*, there appears no reason for their Exclusion.

Upon the Subject of a Woman's Evidence, I cannot omit some Observations in relation to the Weight and Efficacy of it upon the Point of her Children's Legitimacy. *Eustathius* upon this Passage of *Homer* ⁷,

Μήτηρ μὲν τ' ἐμέ φησι τῷ ἔμμεναι· αὐτὰρ ἔγωγε
οὐκ οἶδ'· ἔ γάρ πώ τις ἐὼν γόνον αὐτὸς ἀνέγνω. †

has the following Observation :

Δοκεῖ δὲ καὶ αὐτῷ Ἀριστοτέλει τὰ εἰρημένα ὀρθῶς ἔχειν· ὅς φησιν ἄριστα περὶ τῶν τέκνων κρίνεσθαι αἱ γυναῖκες. Διό φησι, Πηπαρηθία τις γυνὴ μαρτυρήσασα οἰκείαν τινα εἶναι παῖδα, ἔλυσεν τὴν περὶ ἐκείνης ἀμφιβολίαν. §

The Passage of *Aristotle*, alluded to by *Eustathius*, is probably this :

Οἶον, ἐκ τῆς Πηπαρηθίας, ὅτι περὶ τῶν τέκνων αἱ γυναῖκες πανταχῶς διορίζουσι τ' ἀληθές. Τῷτο μὲν γὰρ Ἀθήνησι, Μαντία τῷ ῥήτορι ἀμφισβητῶντι πρὸς τὸν υἱὸν ἡ μήτηρ ἀπέφηνε· τῷτο δὲ Θήβησιν Ἰσμηνίει καὶ Στίλ-

* *Honores magnos consecuta est: in quibus erat id, ut illius (quod mulierum soli compete-
bat) testimonium reciperent.*

† *Mater quidem me ait ejus esse: at ego*

Nescio; nondum enim quisquam suum parentem ipse cognovit.

§ *Videntur autem et ipsi Aristoteli dicta recte se habere, qui dicit, optime de liberis judicare mulieres. Quare ait, Peparethia quaedam mulier, cum testimonium dixisset de filio, quod revera ejus esset, solvit de eo dubitationem.*



πῶν αἰμφισβητάντων, ἡ Δαδωνὶς ἀπέδειξεν Ἰσμηνίε τὸν υἱόν· καὶ διὰ
τῆτο Θεσσαλίσκον Ἰσμηνίε ἐνόμιζον³. ||

³ II. Rhet. 24.

But farther yet: The Roman Law was so favourable to presumed Legitimacy, that when any one could prove himself born of such a Marriage, It would conclude for his Legitimacy *against the single Profession of the Mother* to the contrary; even though she was convicted of Adultery². ² Hoppius ad J. 1. 9. pr.

In regard to their Children, the natural Affection was common to both Parents: but the Authority, the *Jus Parentelae in liberos*, was confined to the Father. For those, who were *sub potestate* themselves, could not have others so.

*Nemo potest alium in sua manu habere, qui ipse in aliena est*¹.

¹ Senec. III. Controvers.

For which reason, the Term *Materfam.* was more owing to Courtesy, than any real Authority¹. Therefore they had not the Right of Adoption:

² D. 50. 16. 196. 1.

*Nisi ex Indulgentia Principis, ad solatium Liberorum amissorum*³.

³ J. 1. 11. 10.

With us, a Woman upon Marriage loses her Family-Name, and passes over into her Husband's House, as *Vlpian* says of the Roman Women,

*Mulier Familiae suae et Caput et Finis est*⁴.

⁴ D 50. 16. 195. vlt.

Upon which account, She cannot convey the Honors of her Father to her Descendants, unless by particular Grant, or Privilege.

The legal Circumstances of the Sex in this Kingdom are chiefly confined to the Contemplation of Coverture. And the Law adjudging Husband and Wife to be one Person, will be a Guide and Rule for all Considerations which attend them in that State. Not that they are without many Civil Incapacities besides: insomuch that a great person in the Law pronounced of the Women in England, that They are considered only as *Servants* of a better Fashion⁵. It has been so in all Ages and Countries: whence the Complaint of *Medea* in *Euripides*, that Women are sold for Slaves with their own Money:

⁵ See Shaw's Travels, pag. 303.

Γυναῖκες ἐσμὲν ἀθλιώτατον φυτὸν,
ὡς πρῶτα μὲν δεῖ χρημάτων ὑπερβολῇ
πόσιν πρίασθαι, δεσπότην τε σώματος
λαβεῖν.*

|| *Velut, illud ex Peperethia sumptum: Quod Mulierum judicium de liberis, cum ambigatur, ex quo patre sint orti, verum ratumque ubique sit. Hoc enim Athenis accidit. Nam Mantiae Oratori cum filio, quem ignorabat, controversanti, mater indicavit, cujus esset Filius. Hoc item evenit Thebis; Ismenia et Stilpone controversantibus, Dodonis Mulier demonstravit Ismeniae filium, et ob id Thessalicum Ismeniae postea adjudicarunt.*

* *Nos Mulieres sumus miserrima Prologo,
Quas primum quidem oportet maximis opibus
Comparare maritum, dominumque corporis
Accipere.*

The

⁵ Mercat. IV.
6. init.

The Complaint of the Woman in *Plautus*⁶ is less reasonable :

*Ecastor lege dura vivunt Mulieres,
Multoque iniquiore miserae quam Viri.
Nam si vir scortum duxit clam uxorem suam,
Id si rescivit uxor, impune est viro.
Vxor vero si clam domo egressa est foras,
Viro fit causa, exigitur matrimonio.
Vtinam Lex esset eadem, quae uxori est, viro.
Nam uxor contenta est, quae bona est, uno viro :
Qui minus vir una uxore contentus fiet ?*

⁶ Not. ad Ly-
siam, Orat. I.
pag. 18. seqq.
Edit. Lond.

For though *quoad Fidem*, the Duty of both Sexes is mutual, yet the Civil Inconveniences, which attend the breach of this Fidelity in the One more than the Other, have reasonably set a difference between them⁶.

A G E.

Mankind had always different Rights, Considerations, and Affections, with regard to Age.

Servius Tullius, when He classed his People, divided the Age of Man into three Stages :

Pueritia I. — XVII.
Juventus XVII. — XLVI.
Senectus XLVI. et deinde.

C. Tubero Historiarum primo scripsit, Servium Tullium, Regem P. R. cum illas quinque classes Juniorum census faciendi gratia institueret, Pueros esse existimasse, qui minores essent XVII; atque inde ab Anno XVII^{mo}. quod idoneos jam esse Reip. arbitraretur, milites scripsisse, eosque ad annum XLVI^{um}. Juniores, supraque eum annum Seniores appellasse. Eam rem propterea notavit, ut discrimina quae fuerint judicio moribusque majorum, Pueritiae, Juventae, Senectae, ex ista Censione Servii Tullii, prudentissimi Regis, noscerentur⁷.

⁷ Gell. X. 28.

⁸ D. 2. 15. 8. 10 This Division is countenanced by *Ulpian*⁸.

With the Canonists there are six Ages :

<i>Infantia</i>	——	I. — VII.	
<i>Pueritia</i>	——	VII. — XIV.	
<i>Adulta Aetas</i>	}	XIV. — XXVIII. vel XXV. sec. <i>Jura</i> (i. e. <i>Jus Civile</i>).	
<i>Adolescentia</i>			
<i>Juventus</i>	——	XXVIII. — L.	
<i>Aetas Senilis</i>	}	L. — LXX.	
<i>Gravitas</i>			
<i>Senectus</i>	——	LXX. etc. <i>Senium vero, ultima pars Senectutis</i> ⁹ .	

⁹ Lyndwood
De Sacra Vn-
ctione. c.
Sacerdotis.
verb. Adultus.

The *Aetas Robusta*, or *Militaris*; the *Juventa*, quia ea juvamus Remp.¹ the Period from XVII. to XLVI. as settled by *Servius*, was thought too large by the succeeding Romans, who therefore dated it from XXV.²

That Period was still more contracted by *Varro*³.

Divisio Varroniana,

<i>Pueritia</i>	_____	I. — XV.
<i>Adolescentia</i>	_____	XV. — XXX.
<i>Juventa</i>	_____	XXX. — XLV.
<i>Senium</i>	_____	XLV. — LX.
<i>Senectus</i>	_____	LX. et deinceps ⁴ .

¹ Varro apud Cenforin. c. 14.
² D. 48. 5. 15. 6.
³ Cenforin. l. c.

⁴ Add. Serv. ad Virg. V. Aen. 295.
⁵ Lib. I. init.

Something to this purpose may be gathered from *Florus*⁵, in the Comparison which He introduces between the Periods of the Roman Power, and the Stages of Human Life.

P. R.	<i>Infantia</i>	—	<i>Annorum</i>	250.
	<i>Adolescentia</i>	—		200.
	<i>Juventa</i>	—		250.
	<i>Senectus</i>	}	—	200. ⁶
	<i>ab Augusto</i>			
	<i>ad Trajanum</i>			

⁶ Add. Ammian. Marcell. l. 14.

According to these Distributions, which extend *Juventus* to Forty-five or Forty-six, it is, that *Polybius* calls *Hiero* Νεός, or *Juvenis*, when He was past Thirty: and *Dion Cassius* calls *Caesar* by the same Appellation, when He was near Forty. And *Varro*, who extends *Adolescentia* to the 30th Year, will explain many Passages, which otherwise would appear harsh.

Thus *Eumenes* is called by *Corn. Nepos*, *Peradolescentulus*, at the Age of XXIII. And *Atticus*, *Adolescens* at XL⁷, as some have imagined. But I think They are mistaken⁸.

So *Xenophon* seems to be called Νεανίσκος at Fifty⁹.

When the Age of Man came to be settled with greater exactness by the Civilians, the Division stood thus:

<i>Homines</i>			
<i>Minorennēs</i>		<i>Majorennēs</i>	
<i>Impuberes.</i>	<i>Puberes.</i>	<i>Juvenes.</i>	<i>Senes.</i>

With the Romans, a Person at XXV. and not till then, was called *Majorennis*: what We now mean by *Coming at Age*, and what our Law has settled at XXI. It is where Puberty ends¹.

This is called *Aetas robusta*². It is called by the Lawyers also *Aetas perfecta, plena, integra*, quod fit crescendi finis.

And because no legal Act could be done till that time, this Majority, or *Aetas major*, is sometimes called *Aetas legitima*³; and sometimes, very properly, *Status*⁴.

⁷ Nep. in Attic. c. 8.

⁸ Of this see more, Ernst. ad Nep. in Attic. c. 2. Manut. ad Cic. II. Fam. 1.

⁹ See Menag. ad Laert. II. 49.

Spelm. Translat. of the Anabasis B. II. Not. 10.

¹ Hippocrat. apud Galen. 5. Aphorism. 9.

² D. 48. 5. 15. 6.

³ D. 3. 5. 27. 26. 2. 32. 2. fin.

27. 7. 1. pr. 34. 5. 16. 9.

46. 1. 41. pr. Brisson. Select. Antiqq. III. 2.

⁴ D. 31. 1. 77.

This¹⁴

This was owing to a Conceit of the Age of Man being settled at *One Hundred*: and so they gave one Quarter to the first Stage.

* D. 7. 1. 56.

C. 1. 2. 23.

Plin. VII. 4.

et 48. XI. 37.

Et placuit C. annis tuendos esse, quia is finis Vitae longævi Homini est ⁶.

This was the Doctrine of *Dioscorides*. The Egyptians were of the same

Opinion. And thus the Romans, at Proclamation of the *Ludi Saeculares*,

ASSEMBLE TO SEE WHAT NO BODY HERE EVER SAW

OR EVER WILL SEE AGAIN ⁷.

⁷ Varro de L.

L.

⁸ VI. Observ.

3.

⁹ D. 50. 17.

108.

It has been remarked by *Cujacius* ⁸, that *Aetas* taken solely shall undergo a Variety of Significations. Sometimes it stands for the *Aetas pupillaris*, or That under Fourteen, as when, through a tenderness of

Law, the Civilians write in *poenalibus judiciis Aetati succurritur* ⁹.

Sometimes it signifies Puberty, or Years of Discretion:

Si Tutores testamento vobis dati sunt, quanquam unus vestrum suae aetatis factus sit, id est pupillarem aetatem excefferit, tutela tamen vestra ad eum non pertinet ¹.

¹ C. 5. 28. 3.

But generally it stands for full and compleat Age, or, what We call Turned of Five-and-twenty.

Aetas again is sometimes taken for a Generation, or one Descent of Mankind; which is commonly set at *Thirty Years*: And *Aetas* moreover is the full Age, or Life of one Man, which We have just above seen to be accounted *one* compleat *Century*.

The great Distinction therefore was into *Majors* and *Minors*. But *Minors* were again subdivided into *Puberes* and *Impuberes*: and *Impuberes* again underwent a Subdivision, into *Infantes* and *Impuberes*. Thus then upon the whole,

Minors.	1. Infantia	—————	I. — VII.
	2. Pueritia	—————	VII. — XIV.
	3. Pubertas	—————	XIV. — XXV.
Majors.	4. Juventus	—————	XXV. — L.
	5. Virilitas	—————	L. — LXX.
	6. Senium	—————	LXX. — etc.

The first Period is fixed at *seven* Years, according to some Conceits of the old Physicians, and Philosophers, who were persuaded, that every Period of seven Years wrought some Alteration in the Human System.

Thus *Hippocrates* ².

² apud Phil.
Jud. de Mundi
Opific. T. I.
pag. 26. Edit.
Mangey.

Εν ἀνθρώπῳ φύσει ἐπὶ ἑπτὰ εἰσὶν ὥραι, αἷς ἡλικίας καλέεσσι, παιδίον, παῖς, μαιράκιον, καὶ αἱ λοιπαί· καὶ ΠΑΙΔΙΟΝ μὲν εἰς ἄχρις ΕΠΤΑ ἐτῶν, ὁδόντων ἐκβολῆς· ΠΑΙΣ δ' ἄχρι γονῆς ἐκφύσεως, εἰς τὰ ΔΙΣ ΕΠΤΑ. ΜΕΙΡΑΚΙΟΝ δ' ἄχρι γενεῖς λαχνώσεως, εἰς τὰ ΤΡΙΣ ΕΠΤΑ. ΝΕΑΝΙΣΚΟΣ δ' ἄχρι αὐξήσεως ὅλης τῆς σώματος, εἰς τὰ ΤΕΤΡΑΚΙΣ ΕΠΤΑ· ΑΝΗΡ δ' ἄχρι ἐνὸς δέοντος πενήκοντα, εἰς τὰ ΕΠΤΑΚΙΣ ΕΠΤΑ. ΠΡΕΣΒΥΤΗΣ δ' ἄχρι πενήκοντα ἔξ, εἰς τὰ ΕΠΤΑΚΙΣ ΟΚΤΩ, τὸ δ' ἐνέϋθεν, ΓΕΡΩΝ.*

* In hominis natura septem sunt tempora, quas aetates vocant, infans, puer, adolescens, etc. Infans est aene intra septennium dentes emittat. Puer usque geniturae excretionem, ad geminatum So

So Solon also *,

*Ibid. p. 25.

Παῖς μὲν ἀνήθος ἔων ἔτι νήπιος, ἔρκος οὐδόντων
 Φύσας ἐκβάλλει πρῶτον ἐν ἐπ' ἔτεσιν.
 Τὸς δ' ἑτέρας ὅτε δὴ τελέσει θεὸς ἐπ' ἐνιαυτῶς,
 Ἡβῆς ἐκφαίνει σήμαϊα γεινομένης.
 Τῇ τριτάτῃ δὲ γένειον ἀεζομένων ἐπὶ γυίων
 Λαχνῆται, χροίης ἄνθος ἀμειβομένης.
 Τῇ δὲ τετάρτῃ πᾶς τις ἐν ἑβδομάδι μέγ' ἄριστος
 Ἰσχυὴν, οἱ τ' ἄνδρες σήματ' ἔχουσ' ἀρετῆς.
 Περμπλή δ' ὄριον ἄνδρα γάμῳ μεμνημένον εἶναι,
 Καὶ παίδων ζητεῖν εἰσπίσω γενεήν.
 Τῇ δ' ἑκτῇ περὶ πάντα καθαρτύεται νόος ἀνδρὸς,
 Οὐδ' ἔρδειν ἐθ' ὅμως ἔργ' ἀπάλαμνα θέλει.
 Ἐπὶ δὲ νῦν καὶ γλῶσσαν ἐν ἑβδομάδι μέγ' ἄριστος,
 Οὐκ ἴω τ', ἀμφοτέρων τέσσαρα καὶ δέκ' ἔτη.
 Τῇ δ' ἐνάτῃ ἔτι μὲν δύναται, μαλακώτερα δ' αὐτῇ
 Πρὸς μεγάλην ἀρετὴν σῶμά τε καὶ δύναμις.
 Τῇ δεκάτῃ ὅτε δὴ τελέσει θεὸς ἐπ' ἐνιαυτῶς.
 Οὐκ ἂν ἄωρος ἔων μοῖραν ἔχοι θανάτου*.

And this led the Physicians to place a just Conception at the end of *Seven Months*; that being the productive or generative Number, *τελεσφόρος* all upon the Pythagorical Ratio of Numbers³.

So Infants with the Romans, who died before the *seventh* Month, had not the ordinary Rites of Sepulture.

*Et minor igne rogi*⁴.

³ D. 1. 5. 12.
 Gothofred.
 ad loc.
 Gell. III. 10,
 16.
 Macrob. I. in
 Somn. Scip.
 6.

septennium. Adolescens usque barbae hirsutiem, ad annum ter septimum. Juvenis usque dum crescit totum corpus, ad quater septimum. Vir usque undequinquagesimum, ad septies septimum. Senior usque sextum supra quinquagesimum, ad octies septimum. Quicquid vero deinceps sequitur, ad senium pertinet.

Juven. XIV.
 Sat. 10.
⁴ Id. XV. 140.
 Plin. VII. N.
 H. 16.

* Infans septenos postquam compleverit annos,
 Vallum oris, dentes conspiciere incipies.
 Postquam septem alios deus huic concesserit annos,
 Fit Pubes, semenque huic genitale datur.
 Verum septem aliis postquam annis creveris aetas,
 Densa seges barbae contegit orta genas.
 Additus est illi cum septenarius alter,
 Vir tum virtutis fortia signa dabit.
 Hinc monet adveniens uxorem ducere quintus,
 Posteritatis et hunc tum meminisse suae.
 Solers ingenium est, firma et prudentiae sexto,
 Stulta nec hoc deinceps facta videre juvat.
 Septimus accessit cum septenarius, atque
 Octavus, lingua pollet et ingenio.
 Nono aliquid possunt, sed jam minuuntur in illo
 Vires, quae peragunt fortia facta viri.
 Sed decimus cum alios septem perfecit annos,
 Maturam mortem tristia fata dabunt.

K k

I have

I have read, that in some Parts of the East, Fathers never see their Children, till they are seven Years of Age, never mourn for them, *etc.* if they die before: looking upon them, till that time, as so many greater Embryons.

The Mystic Number SEVEN, its Powers and Properties, was a rich Subject for that visionary Race of Men, who laid themselves out so much upon those very sublimated Inquiries,

⁷ Philo l. c.

Τὴν Εβδομάδος φύσιν ἐκ οἷδ' εἴτις ἱκανῶς ἀνυμνήσαι δύναίτο, παντὸς ἔσαν λόγου κρείττονα.*

This great Conception of so considerable a Number, supported by those Steps or Stages, which *Solon* and *Hippocrates* laid out a little above, produced the prevailing Superstition of the Climacteric Years; and (if the Consideration should not be thought too great a Digression) has been the fruitful Parent of many traditional and vulgar Conceits, which the Generality of Mankind has past by unnoticed. For Instance:

⁸ See Concil. Aug. Vol II. pag. 700, 707. and Lyndwoodde Summa Trin c Ignor. Sacerd.

The Church of Rome has been particularly fond of this lucky Number. In a Synod held at York, A. 1466⁸ (among others) the Articles of Faith, in relation to the Trinity, were laid out into *Seven*, and those concerning Christ's Humanity into the *same Number*. The same Church tells us of *Seven* deadly Sins, of *Seven* principal Virtues, and *Seven* Works of Mercy: but because St. *Matthew* could furnish but *Six* of these last, they borrowed the *Seventh* from *Tobit*. And I am much mistaken, if it is not to the traditional Merit of this holy Number, that the Members of that Church are indebted for their *Seven* Sacraments.

It stopt not here. Both ancient and modern Fable set out upon the same Principle, and adorned their Annals with *Seven* Sleepers. For in both ancient and modern Fable we find them. Chivalry and Romance, in like manner, furnished Christendom with *Seven* Champions. And, lastly, in compliance with this prevailing Humour, We may thank the Vulgar, no doubt, for our *Seven* Senses.

⁹ Acad. des Inscriptions, Tom. VI.

Thus the old World had its *Seven* Wonders: and so have some Divisions of it now. The *Seven* Wonders of Dauphiné may be seen in a French Writer⁹. And He must be a great Stranger to genuine Antiquity, who has not heard of the *Seven* Wonders of Wales also.

But of some of the forementioned Stages in their Order:

1. *Infans, qui nondum loquitur.*

¹ D 26.7.1.2.

Ita tamen, ut pro his, qui fari non possunt, vel absint, ipsi Tutores judicium suscipiant: pro his autem, qui supra septimum annum aetatis sunt, et praesto fuerint, auctoritatem praesentent¹.

² C. 6 9. 3.

Infantis nomine agnitam bonorum possessionem, et antequam loqueretur, diem functi, recte competere nulla dubitatio est².

And thus, though Spousals are not limited to any Age, yet Infancy is not esteemed in the Computation.

* *Ceterum Septenarii naturam nescio an quis satis laudare queat, cum ea sit praestantior, quam ut ulla facundia possit exprimi.*

In Sponsalibus contrahendis Aetas contrahentium definita non est, ut in Matrimoniiis. Quapropter et a primordio aetas Sponsalia effici possunt, si modo id fieri ab utraque persona intelligatur, id est, si non sint minores, quam septem annis³.

³D. 23. 1. 14.
Nov. Leon.

2. *Pueritia*, or the *Second Stage*, That between *Infancy* and *Puberty*, is sometimes called by the name of *Aetas Pupillaris*. For *Pupilli*, *Pupillaeque*, cum *Puberes esse coeperint*, a *Tutela liberantur*⁴. From which time to XXV, they were under *Curators*⁵.

¹⁰⁹.

⁴J. 1. 22. pr.

⁵J. 1. 23. pr.

Be it remembered, that this *Septennium*, or *Interval*, was divided into two equal *Parts*, in regard to each *Sex*: and the *Person* in each *Moiety* of this *Stage* was denominated accordingly; viz.

First Half.

VII--X $\frac{1}{2}$ *Infantiae proximus*,
VII--IX $\frac{1}{2}$ *Infantiae proxima*.

Second Half.

X $\frac{1}{2}$ --XIV *Pubertati proximus*.
IX $\frac{1}{2}$ --XII *Pubertati proxima*⁶.

⁶Gloss. ad.
J. 3. 20. 10.

And the reason is plain: for these two *Divisions* of the same *Stage* have different considerations in *Law*.

*Nam Infans qui Infantiae proximus est, non multum a Furioso distat*⁷. ⁷J. 3. 20. 10.

*Pupillum, qui proximus Pubertati sit, capacem esse et furandi et injuriae faciendae*⁸.

⁸D. 50. 17.

And may therefore be corrected, but lightly only:

111. pr.

Add D 47. 2.
23.

*Fere in omnibus poenalibus Judiciis et Aetati et Imprudentiae succurritur*⁹.

⁹D. 50. 17.
108.

3. The *Third Step* was *Puberty* XIV—XXV. This was called *Aetas Adulta*. *Aetas Praetextata*¹. *Aetas Justa*². And when *Majorennitas* is called *Justa* too³, it is in regard to those several *Acts* which those several *Ages* are impowered to do by *Law*.

¹D. 43. 30. 3.

6.

²D. 12. 4. 8.

³D. 50. 5. 2. pr.

These three together were called *Aetas Imperfecta* I—XXV⁴.

⁴C. 2. 41. 5.

It must be remembered that *Puberty* in *Men* was at XIV, in *Women* at XII⁵.

⁵J. 1. 22. pr.

*Tempus etiam Ethnici observant, ut ex Lege Naturae jura sua aetatibus reddant. Nam Feminas quidem a duodecim Annis, Masculum a duobus implius ad negotia mittunt*⁶.

⁶Tertullian.
de Virgin.
Veland.

*Secundum Jura publica duodecimus annus in Femina, et quartus decimus in puero definit Pubertatis aetatem*⁷.

⁷Macrob.
VII. Saturn. 7.

Puberty also was distinguished, during its Period. For there was a
¹ J. 1. 11. 4. *Pubertas plena*, In Males, at XVIII. In Females, at XIV'. *Didymus*
² D. 34. 1. 14. 1. informs us, that *Hērōs* was the Term for a Person between the Age of
³ Ad Homer. Odyss. r. 401. XIV. and XVIII.

These are the most remarkable Divisions of Age in a Legal Consideration.

In the English Law Age has different Effects. And in order to comprehend them, my Reader will understand, That, agreeable to the Civil Law, We have a Period like theirs at Fourteen (or Years of Discretion) and another of full Age, though not exactly at the same Computation: And That, accordingly, several Acts are valid with us when done at the *Age of Discretion*, and several not till the *Legal Age* of One and Twenty. Of which the Books of Common Law will furnish Particulars.

THE CONSIDERATION of *Personae* leads us into a Disquisition of the great Relations in Civil Life, viz.

Husband and Wife.

Father and Son.

Master and Servant.

Correspondent to the three Titles in the Law-books :

De Nuptiis.

De Patria Potestate.

De Servis et Ingenuis.

Let it be observed, that great Societies are made up of less: Cites are composed of several Families: and every Family of those three Relations, which I have now recited.

In other words: All Societies are either *Simple* or *Compound*. Simple are such, as consist between two Parties, or at least a very Few: Compound are such, as subsist between one Society and another.

The most Simple is made up of Husband and Wife: of Father and Son: of Master and Servant. And a Society, as I said, compounded, or made up of these lesser Societies, is called a Family.

Διτὸν γὰρ εἶδος πόλεων, μείζονων καὶ βραχυτέρων αἱ μὲν ἐν μέλλουσιν αἵματι καλῶνται, οἰκίαι δὲ αἱ βραχυτέρας.³*

³ Philo de Legg. Special. pag. 327.

⁴ Francof. 1615. 4. Add Demosth. c. Aristogit. I. pag. 494. Edit. Cant.

This Thought is pursued by *Aristotle* in his Book of Politics, or *De Republica*: and after him by *Arniseus de Civitate et Familiis*⁴: This was a Notion which all the Ancients gave into. *Homer* describing a State of Nature, or that Period, which preceded the Establishment of Cites and

* Duplex enim est Species Civitatum, majorum et minorum. Quorum majores Urbes appellantur, minores autem Familiae.

Empires,

Empires, draws every Master of a Family exercising a little Sovereignty within his Cottage,

Θαμίζεῖ δὲ ἕκαστος
Παιδῶν ἢ δ' ἀλόχων, ἔδ' ἀλλήλων ἀλέγχει.*

⁵ Homer.
Odyss. IX.
114.

However every single Family in a State of Nature represented only one Person. For indeed the *P. familias* was the only one considered. The Woman had *nullam Personam*, the Slave none, and the Son was not considered as distinct from his Father.

The most minute and Original Society, says *Aristotle*, *et in diem constituta*, is a Family: The Members of which Society are called by *Charondas* ῥμοσίπυοι §, by *Epimenides* ὁμοκάπνοι ||⁶. Several of these spreading out into Settlements, like Colonies, form a Village; which therefore is defined to be *Societas, ex pluribus domibus conflata*. And as many Families form a Village, so many Villages form a City, or the most perfect Society, according to *Aristotle*⁷. This Progress is well described by *Tully*: Civil Society, says he,

⁶ Aristot. I.
Polit. 1.

⁷ Ibid.

Nata a primo satu, quo a Procreatoribus nati diliguntur, et tota domus conjugio et stirpe conjungitur, serpit sensim foras cognationibus primum, tum affinitatibus, deinde amicitiiis, post vicinitatibus, tum civibus, et iis qui publice socii atque amici sunt, deinde totius complexu Gentis Humanae⁸.

⁸ Cic. V. de
Finib. 23.
Add. D. 50.
16. 195. 2.

Cum sit hoc natura commune omnium Animantium, ut habeant libidinem procreandi, prima Societas in ipso Conjugio est, proxima in Liberis, deinde una Domus, communia omnia. Id autem est principium Urbis et quasi Seminarium Reip. Sequuntur Fratrum Conjunctiones, post Consobrinorum Sabrinorumque, qui cum una domo capi jam non possint, in alios domos, tanquam in Colonias, exeunt. Sequuntur Conubia et Affinitates, ex quibus etiam plures Propinqui. Quae Propagatio et Soboles origo est Rerumpub.⁹

⁹ Cic. I. de
Offic. 17.

¹ Serm.
LXXXII.

And it is admirably expressed by a Greek Writer in *Stobaeus*¹.

† Οὕτως γὰρ ἕκαστος ἡμῶν οἷαν κύκλοις πολλοῖς περιγέγραπται· τοῖς μὲν μικροτέροις, τοῖς δὲ μέισσι, καὶ τοῖς μὲν περιέχουσι, τοῖς δὲ περιεχομένοις, κατὰ τὰς διαφορὰς καὶ ἀνίσχες πρὸς ἀλλήλους σχέσεις. Πρῶτος μὲν γὰρ ἐστὶ κύκλος, καὶ προσεχέςατος, ὃν αὐτὸς τις καθάπερ περὶ κέντρον τὴν ἑαυτοῦ γέγραπται διανοίαν, ἐν ᾧ κύκλῳ τό τε σῶμα περιέχεται, καὶ τὰ τῷ σῶματι ἐνεκα παρειλημμένα. Ἐξεδὴν γὰρ ὁ βραχυτάτος καὶ μικρὸς δὲ αὐτὸς προσαπτόμενος

μενός

* Imperat autem unusquisque
Liberis et Vxoribus: neque se invicem curant.

§ Ex eodem penu visitantes.

|| Eodem fumo utentes.

† Nam unusquisque nostrum undique multis veluti circulis circumscriptus est: quorum alii minores, alii majores sunt, alii continent, alii continentur, juxta diversos et inaequales ad se invicem habitus. Primus etenim et proximus circulus est, quem unusquisque circa mentem suam, veluti centrum descriptus constituit, in quo et corpus nostrum et ad usum ejus pertinentia insunt. Et minimus,

μενος τῷ κέντρῳ κύκλος ἔτος. δεύτερος δὲ ἀπὸ τούτου, καὶ πλεον μὲν ἀφ' ἑαυτοῦ τῷ κέντρῳ, περιέχων δὲ τὸν πρῶτον, ἐν ᾧ τετάχεται γονεῖς, ἀδελφοί, γυνή, παῖδες. ὁ δ' ἀπὸ τούτων τρίτος ἐν ᾧ θεοὶ, καὶ τιτθίδες, πάπποι τε καὶ τίτθαι, καὶ ἀδελφῶν παῖδες, ἔτι δ' ἀνεψιοί. μεθ' ὧν ὁ τῶν ἄλλων περιέχων συγγενεῖς. τέτρω δ' ἐφεξῆς, ὁ τῶν δημοίων, καὶ μετ' αὐτὸν ὁ τῶν φυλετῶν, εἰθ' ὁ πλίστων [corrige ΠΟΛΙΤΩΝ]. καὶ λοιπὸν ἔτις, ὁ μὲν ἀσυγγειτόνων, ὁ δὲ ὁμοεθνῶν. ὁ δ' ἐξωτάτω καὶ μέγιστος, περιέχων τε πάντας τῶν κύκλων, ὁ τῷ παντὶ ἀνθρώπων γένει.

So again, when many Cities or Republics form a League, and have a common Interest, the compound Society becomes more compounded. This was the Case of the Achaean League, of the Amphictyonic Council: and is now of the Helvetic Body, and the United Provinces².

² J. H. Boecler. de Concil. Amphictyon.

Comment. ad Marm. Sand. vic. pag. 52, seq.

³ Aristot. I. Polit. 2.

I.

The First of these Societies is of necessity:

Ανάγκη δὴ πρῶτον συνδυάζεσθαι τῶν ἀνευ ἀλλήλων μὴ δυναμένων εἶναι· οἷον
Θῆλυ μὲν καὶ ἄρρεν, τῆς γενέσεως ἕνεκεν³.*

The Conjunctions of the Sexes was intended by Nature, *ad propagandam et continuandam Speciem*.

*Quid loquar, quanta Ratio in bestiis ad perpetuam conservationem earum generis appareat? Nam primum aliae mares, aliae feminae sunt, quod perpetuitatis causa machinata est Natura*⁴.

⁴ Cic. II. Tusc. 51.

And this produces the first Family Relation: *viz.* That which subsists between

Man and Wife.

II.

The Result of this Family Union produces a new one, which is the End and Design of the First. And this directs us to inquire into the *Patria Potestas*, or those Rights, whether Natural or Civil, which subsist between

Father and Son.

nimus, ipsumque prope centrum attingens hic circulus est. Ab hoc secundus, remotior a centro, et primum inter se concludens, parentes, uxorem et liberos comprehendit. Tertius avunculos, maternas, avos, avias, nepotes ex fratribus et consobrinis habet. Post illum est qui reliquos cognatos continet, deinde popularium, mox tribulium, postea Civium circuli sequuntur: ab illis urbi vicinorum circulus, et alius gentiliam sive ejusdem Nationis, ambiunt. Extremus autem et maximus, omnes ambitu suo concludens, totius hominum generis est.

* Necessesse est primum coalescere eos qui sine ea conjunctione esse non possunt, veluti Feminam et Marem, procreationis causa.

III. The

III.

The third Relation is founded upon Convenience. The Care, which is incumbent on every Man, *ut sibi et uxori et liberis prospiceret*, directs him to call in the Assistance of others, where his own Skill or his own Industry would not be sufficient. And this Consideration marks out the Duties of

Master and Servant.

Hesiod according to the Simplicity of his own Times, strikes out the Rudiments of Society in one Line,

Οἶκον μὲν πρώτησι, γυναῖκα τε, βῆν τ' ἀροτῆρα⁵.*

⁵ Aristot. I. Polit. 1.

Here Οἶκος, or the Rudiments of Society, is shadowed out, by comprehending,

1. *The Society of Husband and Wife.*
2. *(Consequentially) of Father and Son.*
3. *Bovem, sive Opem alienam. The Origin of Servitude⁶.*

⁶ Add. Aristot. I. Oecon. 2.

The Rights and reciprocal Duties of these three Relations are essentially different. It was the Opinion of *Aristotle*, that a *Paterfam.* did *imperare Servis Dominice, Filis Regie, Vxori Aristocratice⁷.*

⁷ I. Polit. 2. et ult.

That is, Though the *Paterfam.* had a Power over each, yet that Power was differently circumstanced in these three Relations: the Distinction of which is the proper business of such Inquiries as these.

II. Polit. 2. et 3.

Potestatis verbo plura significantur. In persona Magistratum, Imperium; in persona Liberorum, Patria Potestas; in persona Servi, Dominium⁸.

⁸ D. 50. 16. 215.

So *Terence⁹* distinguishes

⁹ *Adelph. I. 1. 51.*

Hoc Pater ac Dominus interest.

Of each of these in their order.

* *Domum quidem primum, tum uxorem, tum bovem aratorem.*

MARRIAGE.

*Inst. Lib. I. Tit. X.**Dig. Lib. XXIII. Tit. II.**Cod. Lib. V. Tit. IV.**Nov. XXII.**Cod. Theodos. Lib. III. Tit. V. — XVI.*

Besides the Remains of Law, nothing of the Ancients is come down to us upon this Subject, which was doubtless well considered by them. For to such Writers *Servius* alludes in these words, *Qui de Nuptiis*

¹ ad Virg. IV. *scripsisse dicuntur* ¹. We meet with

Aen. 458.

² Gell. IV. 4.

³ Id. IV. 3, 4.

Neratius de Nuptiis ².

Servius Sulpicius de Dotibus ³.

etc.

Among the Moderns the most distinguished are

J. Genesius Sepulveda de Ritu Nuptiarum.

Fr. Hotmani Disputationes juris Civilis.

Ant. Hotman. de Veteri Ritu Nuptiarum.

And. Tiraquellus de Legg. Connubialibus.

Barn. Brissotius de Ritu Nuptiarum.
- - - *de Jure Connubiorum.*

Joachim. Beust de Matrimonio.

Laev. Torrentii Commentarius ad L. Jul. et Pap. Pop. de Matrimonii ordinandis.

Hen. Arnisaeus de Jure Connubiorum.
Paulus Cypraeus de Jure Connubiorum.
Grotius B. II. C. V.

J. Seldeni Vxor Hebraica.

Hen. Brower de Jure Connubiorum.

Pufendorf. Law of Nations B. VI. C. I.

Heineccii Commentarius ad L. Juliam, etc.

⁴ Aristot. II. Polit. 7.

Plutarch. Apophthegm. Lacon.

Dion. Cassius in Orat. Augusti de Coelibatu.

⁵ Above p. 60.

Aristot. I. Ethic. 2. III.

Polit. 12. VII.

2.

⁶ IV. de Legg.

⁷ D. 24. 3. 1.

35. 1. 64. 1.

48. 20. 7. 3.

THE Consideration of Marriage has been the great Attention of all Civil Institutions⁴: both because it greatly affects the Interest and Happiness of Individuals, which is much connected with that of the Public⁵; and because it is, as We lately considered it, the Seminary of Society.

It is for this reason, that *Plato*⁶, with great Judgment, directs his Legislator to take his stand from this Principle; and, for the better ordering of his Commonwealth, to begin, where that also begins, viz. the Considerations of his Family-Connection.

Some Nations have contemplated this Union too partially and too injudiciously, as if the only End and Design of it was to stock the Country with Subjects. Which indeed in a political Consideration is a great one⁷. Both

Xenophon

*Xenophon*⁸ and *Plutarch*⁹ will furnish us with Examples, how attentive *Lycurgus* was to the *Breed* of his People, in a very licentious and very unjustifiable Commerce of the Sexes, even to the utter disregard of that Faith, which is the Foundation of these Societies, and of that Harmony, which supports and adorns them.

⁸ de Lacedaem. Rep. init.
⁹ Vit. Lycurg. pag. 105. Edit. Bryan.

To the Roman Law though We are very much indebted for many excellent Regulations concerning this Contract, which the Practice and Imitation of the wisest part of their Successors has sufficiently justified; yet their Apprehensions of it have not in all respects been suitable to the great and original Design of it. The Exclusion of a great Part of Mankind, in the Persons of their Slaves, from the Rights and Considerations of it (though in this regard they have not been singular) is but too confined a Speculation of an universal Law. The Countenance which They gave to Concubinage was very scandalous, and approached very near the Polygamy of some Nations. And lastly, the frequent Contemplation of Marriage as the Foundation of the *Patria Potestas*, as a *Title*, by which was acquired the *Family-Dominion*, has lost much of its Weight and Use with the present World, where that Dominion is considerably abated in its Power and Extent.

¹ J. 1. 9. ult.
D. 1. 6. 4.
Vlpian. V.
Tit. 1.

The Canonists again have erred in other Respects: have interdicted the use of it to a considerable Part of Mankind, where God has not interposed; and where they have allowed it, have wrapt it up in Mystery and Sacrament. *Nuptiae* with them is *Sacramentum Laicis proprium, quo Vir et Mulier secundum praecepta Ecclesiae conjunguntur*.

A. Faber in Jurisprud. Papin. Tit. de Nuptiis, Princip. II.

Thus has this great Subject been affected by the Spirit of different Legislations, the Interest of Power, and the Intrigue of Politics; and is a very striking Instance of that Variety and Disagreement, which I have observed² to be the Fate and Condition of all Civil Law² pag. 132. whatsoever.

I shall consider the *Jus Nuptiale* as of that sort, which We have formerly³ called the *Jus Civile Mixtum*. For some of its Rules are suggested by *natural Reason*, and others are added by *positive Institution*, to regulate, to supply, to explain, to enforce, and to ascertain the former.

³ Ibid.

For Instance. In order to obtain the End of this Union or Society, viz. *Liberorum Procreatio*, Nature suggests, that the Persons thus uniting should be of a proper Age, but goes no farther. It is left to Human Law, which in different Climates is subject to different Disposition, to define, what shall be the Age, the Condition, and other Circumstances of the Contracting Parties.

Again. As all Marriage is in its own nature a Contract, the Civil Law furnishes and interprets the Rules and Measures of that Contract. Hence the Infinity of Questions concerning *Espousals*, etc. in the Roman and Canon-Law Books. Hence also the different Solemnities which have obtained in different Countries about the Rites and Celebrations, the Forms and Validity, of those Contracts.

Moreover, as there is in the Marriage State an equal Attention to all domestic Concerns, and each Sex is interested in the Education and Maintenance of their common Children, hence so many Civil Laws in regard to the Woman's Fortune, and Settlements, the Laws con-

^s D. 24. 3. 1. cerning *Dowry, Alimony, etc.*^s

Lastly, in the Eye of the Civil Law, As this Union is the Suggestion of Nature, the Rights which attend the *Natural* State of it, exhibit a different Scene from that Union when it is clothed with *Civil* Considerations, and regulated by Positive Sanctions. This marks out the difference between *Matrimonium* and *Nuptiae*, as We shall observe presently. Thus the Propagation and Continuance of Mankind, which was all that was intended by Nature in the mutual Appetite of the Sexes, is conducted by Rules of Positive Law in the regular Channel of lawful Wedlock: Promiscuous Amours are discountenanced, and in their stead an honorable and social Union established: Successions carefully distinguished, and Education properly provided for. This, I say, was the Light in which it was considered by the Ancients, who always dealt out such Acknowledgments as these to the Founders of Civil States and Empires; viz.

⁶ Hor. ad Pionones, 398.

⁷ Id. 1. Serm. III. 105.

⁸ Fragm. C. Lucinii Calvi.

Concubitu prohibere vago, dare jura Maritis,

Oppida moliri, leges incidere ligno.

Oppida coeperunt munire, et ponere leges,

Neu quis Fur esset, neu Latro, neu quis Adulter⁷:

Et leges sanctas docuit, et chara jugavit

Corpora conjugis, et magnas condidit urbes⁸.

Their Sense of the Difference between the Promiscuous and Connubial Scheme may be apprehended from these Passages of *Lucretius*. The Former is described in these words:

Et Venus in sylvis jungebat corpora Amantum;

Conciliabat enim vel mutua quamque Cupido,

Vel violenta viri Vis, atque impensa Libido,

Vel Precium, Glandes, atque Arbuta, vel Pira lecta⁹.

⁹ V. 960.

The Other,

Et mulier conjuncta viro concessit in unum,

Castaque privatae Veneris connubia laeta

Cognita sunt, prolemque ex se videre coortam¹.

¹ Ibid. 1010.

It was for this Reason, that *Cecrops*, the Founder of the Athenian Constitution, by his Establishment of lawful Marriage, obtained the appellation of *Διφυής*.

Εν δὲ Αθήναις πρῶτος Κέκροψ μίαν ἐνὶ ἔξευξεν, ἀνέδην τὸ πρότερον ἔσῶν τῶν συνόδων, καὶ κοινογαμίων· διὸ καὶ ἔδοξε τισὶ διφυῆς νομισθῆναι, καὶ εἰδότην τῶν πρότερον διὰ τὸ πλῆθος τὸν πατέρα.*

² Athen. I. 13. iiii.

* *Athenis primus Cecrops unam esse anius edicto sanxit, cum antea licenter et inverecunde cum viris femine congredierentur, et nuptiae communes essent. Quamobrem cum quidam fuisse putarunt ancipitis naturae, cum ne scirent illi prisca ob coitus promiscuos quis esset suus pater.*

Κάδμος

Κάδμος ἐγγλῶσσοι διδάσκειν ὄργανα φωνῆς,
Θεσμὰ Σόλων ἀχραντὰ, καὶ ἔννομον Αἰθιδί πεινυκῆ,
Συζυγίης ἀλύτοια συμωρίδα δίζυγα Κέκροψ³.*

In like manner the Scholiast upon *Aristophanes*⁴,

Κέκροψ νόμους θέμενος, ὥς φανερώς συγγίνεσθαι — καὶ σχεδὸν εὐρὼν τὰς
δύο φύσεις, τῇ τε πατρὸς, καὶ τῇ μητρὸς, τέτα χάριν διφυῆς ἐκλήθη†.

Γάμους γὰρ καὶ ὑμεναίους ἐν Αθήναις πρῶτον ἀρχθῆναι ὑπὸ Κέκροπος. ὅθεν καὶ
διφυῆ τὸν Κέκροπα λέγεσθαι ὁ Χάραξ φησὶν· διὰ τὸ τὰ νόμιμους ἐκ δύο
φύεσθαι δι' αὐτὸν ἐπέγνωσαν οἱ ἄνθρωποι τῇ τε γάμους εὐρέσει⁵.‡

[Cecrops] ἐκλήθη διφυῆς, ὅτι νόμον ἐξέθετο, ὥς τὰς γυναῖκας παρθένους
εἶναι ἔσας ἐν ἐκδίδοσθαι ἀνδρά, καλέσας αὐτὰς νύμφας. Πρῶτον γὰρ αἱ
τῆς χώρας ἐκείνης γυναῖκες θηριώδη μίξιν ἐμίγνυντο. ἔθενος γὰρ ἦν γυνή,
ἀλλὰ ἐδίδοι ἑαυτὴν εἰς πορνείαν ἐκάσῃ. ἔθενος δὲ ἦν υἱὸς ἢ
θυγάτηρ, τὸ γεννηθέν⁶.§

And much to the same purpose is *Phavorinus*⁷.

So *Tzetzes*⁸,

Πολλοῖς ἐλυσιτέλησεν [Cecrops] καὶ ἄλλοις τῇ Ἑλλάδι.
Νομοθετεῖ καὶ γυναῖξιν τὰς γάμους τὰς νομίμους,
Ἐξ ὧν παῖδες ἐγνώκεισαν τὰς δύο φύσας πορνείας,
Τὸ πρὶν μόνον γινώσκοντες, ὥς ἔφην, τὴν μητέρα.
Ὅθεν ὁ Κέκροψ διφυῆς, νόμοις ὡς δείξας ταῦτα. ||

Though *Plutarch*⁹, and others, account for this Appellation differently. I mentioned this Case of *Cecrops* the rather, because it seems to be alluded to in the Life of *M. Antony* by my last-mentioned Author; but, by a very common mistake, one Lawgiver is misapprehended for another of the same Country, *Solon* for *Cecrops*. *Antony*, it seems, had been very

³ Nonn. Dionysiac. XLI. 382.

⁴ Plut. v. 773.

⁵ Eustath. ad Hom. XVIII. Iliad. 491.

⁶ Suid. v. Πρῶ-
μηθεύς.

⁷ v. Κέκροψ.

⁸ V. Chiliad. 18. Add. Justin. II. 6.

⁹ de sera Num. vindict. p. 283. Edit. Gr. Baf. 1574.

* *Cadmus docet instrumenta vocis disertae,
Fura Solon sacra, et leges in Atticis tabulis,
Connubii insolubilis bigam Cecrops.*

† *Cecrops legibus latis, ut aperte conjungerentur — et prope repertis duabus naturis, Patris et Matris, idcirco appellabatur Biformis.*

‡ *Nuptias enim et Hymenaeos Athenis primum usurpari a Cecrope; unde Charax ait Cecropem Biformem fuisse dictum: propterea quod homines nuptiarum inventionem statuerunt legitimum ortum ex duobus.*

§ *Cecrops dictus est Biformis, quod legem tulisset, ut feminae, quae virgines adhuc essent, uni viro elocarentur: quas Nymphas vocavit. Ante enim illius regionis mulieres more pecudum promiscue cum viris coibant, nec sua cuique viro uxor erat, sed unaquaeque mulier cuiusvis corporis sui copiam faciebat. Vnde etiam nemini constabat, cujusnam filius vel filia esset infans in lucem editus.*

|| *Multis commodavit etiam aliis Graeciae,
Et lege constituit mulieribus nuptias legitimas,
Ex quibus filii cognoverunt duo parentes,
Ante solam cognoscentes, ut dixi, matrem.
Vnde Cecrops Biformis dictus, ut qui talia legibus statuisset.*

licentious in his Mistresses, but justified himself by the Practice of his pretended Ancestor, *Hercules*,

Οὐκ ἐν μιᾷ γαστρὶ θεμένον τὴν διαδοχὴν, ἔδδ' νόμος Σολωνεὺς καὶ κυήσεως
εὐθύνας δεδοικότες, ἀλλὰ τῇ φύσει πολλὰς γενεῶν ἀρχὰς καὶ καθαυτὰς
ἀπολιπεῖν ἐφίεντος*.

In the Prosecution of my Reflections upon Marriage, I shall inquire (1.) What it is. (2.) Upon what it is founded. (3.) How it is contracted. And (4.) How it is dissolved.

I.

What it is. Here I shall produce and explain the several *Appellations*, by which the Ancients have distinguished it; which will open to us a View of some of their Antiquities, and let us into their Apprehensions of this Contract and Solemnity. They are

{ MATRIMONIVM.
NVPTIAE.
CONNIVIVM.
CONIVGIVM.
CONSORTIVM.
CONTVBERNIVM.

(I.) MATRIMONIVM.

The general name is MATRIMONIVM, which includes every species of this Society, as that of *Iustae Nuptiae*, which is applicable to the Romans only; comprehends also the Marriages of Strangers and Slaves; and is even extended to the Brute Creation in great measure, who were imagined by some of the Roman Lawyers, to share with Mankind in this Dispensation of Natural Law.

⁹ D. 1. 1. 1. 3.

Hinc descendit Maris atque Feminae Conjunctio, quam Nos Matrimonium appellamus.—Videmus etenim cetera quoque animalia, feras etiam, istius Juris peritia censerio.

Matrimonium and *Nuptiae* seem sometimes to have no difference:

¹ Cic. pro Cluentio, § 12.
J. 1. 9. 1.

Nuptiae diutinae non fuerunt: erant enim non Matrimonii dignitate, sed sceleris societate, conjunctae.

Yet properly *Matrimonium* is a Term of Natural Law, and stands for that Conjunction or Society which Civil Law does not meddle with, and for that reason is called by Civilians, *Injustum*. So the old Glosses. *Nuptiae*. *Iustum Matrimonium*.

* *Qui non uni utero progeniem commendaverit suam, neque Solonis leges vel judicia liberis tollendis timuerit: verum naturae permiserit complura familiarum semina et propagines relinquere.*

Plane sive justa Vxor fuit sive injusta, accusationem instituere Vir poterit. Nam et Sex. Caecilius ait: Haec Lex ad omnia Matrimonia pertinet: et illud Homericum adfert; Nec enim soli, inquit, Atridae uxores suas amant².

²D. 48. 5. 13.
1.

Papianus libro XV. Responsorum sub titulo ad L. Juliam de Adulteriis, Civis Romanus, qui sine Connubio sibi Peregrinam in Matrimonio habuit, jure quidem mariti eam adulteram non postulat³. —

³Pariator. IV.
5.

This Distinction between *Matrimonium* and *Nuptiae* (We shall see another below) is supported by sundry passages in the Law-books, where *Matrimonium* is the general Word, and *Nuptiae* stands for the Celebration of the Contract or Union, according to the Rules, Requisites, and Ritual of the Civil Law⁴.

⁴J. 1. 10. 12.
D. 24. 1. 27.
et pen.
C. 5. 4. 13.

So true is that Maxim of Law,

Justas Nuptias inter se Cives Romani [soli] contrahunt, qui secundum praecepta legum coeunt⁵.

⁵J. 1. 10. pr.

It is the Spirit and Principle of all Law, to allow no Existence, no Consideration whatever, to what is not transacted by its own Principles: to own nothing to be *done*, but what is *done* according to the Directions and Process of Law. Therefore all such who were not Romans, however the Subjects of the Law of Nature and Nations, were entitled to the Laws of *Matrimonium*, but not of *Nuptiae*.

Quos faciunt justos Ignis et Vnda viros⁶.

⁶Ovid. II. de
A. A. 598.

The Word *Justum* has a different Acceptation, when it refers to *Jus*, and when it refers to *Justitia*. Thus St. Chrysostom, in his Homilies upon St. Matthew, would speak this Language, if he was translated into Latin: *Justius est injustum juste evadere, quam justum injuste perire. Juste, id est, sententia Judicis.*

The Idea of *Jus* therefore stands not here to distinguish between Right and Wrong, but what was *jure cognitum et approbatum*, what was done *jure Romano* and *jure non Romano*. For *Jus simpliciter dictum*, as We have already seen, is always to be understood of *Jus Romanum*⁷. So *Justa Vxor* and *Injusta*⁸; of which Raeverdus⁹ will inform you farther. So *Justi* and *Legitimi Liberi* mean the same thing. As *Justa Aetas*¹ is the Age of XXV, with the Romans, when Acts were good and valid in Law². *Dies Justi* are the XXX. Days, the Allowance, in the Civil Law, *Judicati faciendi*. And those Days also, according to Sex. Pompeius, were called *Justi, cum Exercitus esset imperatus, et vexillum in arce positum*. So a last Will and Testament is defined by Civilians, *Voluntatis nostrae justa Sententia*, etc. a Will made in conformity to the Roman Law; insomuch that Foreigners, *Peregrini*, by the spirit of that Law had not *Testamenti-factionem Activam* or *Passivam*, i. e. could not make a Will to the same purposes as a Roman Citizen

⁷Above, pag. 134.
⁸D. 48. 5. 13.
⁹IV. Var 16.
¹D. 50. 5. 2.
²D. 28. 1. 1.

Citizen could, nor claim under the Will of such a Citizen, nor indeed be a legal Witness to it⁴.

⁴ Gothofred.
ad C. 6. 24. 1.

⁵ Cypræus,
A. Faber, etc.
Forner.
I. Quotid.
Lect. 18.

Upon all which accounts, MATRIMONIUM, as has been observed by many⁵, is so called from the Mother, *a Matre, quam demonstrat Natura*; whereas the Father is He, *quem demonstrant Nuptiae*, and is to be gathered from Civil Principles only.

⁶ D. 2. 4 5.

*Mater semper certa est, etiamsi vulgo conceperit: Pater vero is est, quem Nuptiae demonstrant*⁶.

The Mother is so called, *non quae nupsit, sed quae filios procreat, vel etiam procreatura est*.

⁷ Gell. XVIII.
6.

*Matrimonium a Matris nomine non adepto jam, sed cum spe et omine mox apiscendi*⁷.

There may be a Mother without the Solemnity of Marriage, but there can be no Father.

PATRIMONIUM, on the other hand, signifies those Goods or Estate, which are conveyed by the Father, whose Department and Function it is, to regulate the Finances of the Family; and will therefore comprehend even the Estate, etc. of the Mother, who is supposed to have no Property.

⁸ J. 1. 10. 12.
D. 1. 5. 23.
23. 2. 44. 3.
Vlpian. IV.
Tit. 2.

The Illegitimate therefore, *i. e.* all Those who are born out of Wedlock, *Patrem habere non intelliguntur*⁸. They therefore follow the Mother⁹:

*Cum legitimae Nuptiae factae sint, Patrem liberi sequuntur: vulgo quaesitus, Matrem sequitur*¹,

⁹ D. 1. 5. 24.

¹ D. 1. 5. 19.

are called by her name, and by a great consent of most civilized Nations, are now called *Natural Children*, *i. e.* Natural, as opposed to *Justi* or *Legitimi*. For there was another Sense of *Natural Children*, in the Roman Law, namely that, in which they were opposed to *Adoptive*.

² D. 1. 9. 5.

*Senatoris filium accipere debemus non tantum eum qui naturalis est, verum adoptivum quoque*².

³ Sueton.
Tiber. 52.

*Filiorum neque naturalem Drusum, neque adoptivum Germanicum patria charitate dilexit*³.

⁴ Cic. III.
Philip. 6.

*Ignobilitatem objicit C. Caesaris filio [sc. adoptivo] cujus etiam naturalis pater, si vita suppeditasset, Consul factus esset*⁴.

⁵ D. 19. 5. 5.
pr.
42. 8. 17. 1.

NATURAL CHILDREN with the elder Romans were properly, and indeed only, such as were born of Slaves⁵. These, because their Parents could not be entitled to the Benefits and Emoluments of *Justae Nuptiae*, nay, had no Being in the Consideration of Law, were supposed therefore to be born *extra Nuptias*, and were Children only *quoad Naturam*, not *quoad Jus* or *Civitatem*. Illegitimate Children, or those born of a Roman Father, *sed ex coitu illicito*, were not yet called *Natural Children*, but either passed under the general Name of *Spurii* or *Nothi*, or were classed under their respective and particular Circumstances and Considerations, as We shall see in what follows. And first of the more comprehensive names *Spurii* and *Nothi*.

SPURIUS, say the Lawyers⁶, παρὰ τὴν σποράν, i. e. à Satione. I doubt, ⁶J. 1. 10. 12. or rather do not understand, the Rationale of it. Nor am I better pleased ^{D. 1. 5. 23.} with that of *Plutarch*: but here it follows:

Διὰ τί τὲς ἀπάτορας, ΣΠΟΡΙΟΥΣ υἱὲς καλεῖσιν; ἔ γάρ, ὡς Ἕλληνες νομίζουσι, καὶ λέγουσιν οἱ ῥήτορες ἐν ταῖς δίκαις, συμφορητὲς τινος καὶ κοινὸν σπέρματος γεγονόασιν, ἀλλ' ἔστιν ὁ Σπόριος τῶν πρώτων ὀνομάτων, ὡς ὁ Σέξτος καὶ ὁ Δέκιμος, καὶ ὁ Γάιος. Ταῦτα δὲ πρῶτα τῶν ὀνομάτων ἔχ' ὀλο-γραφῶσιν, ἀλλ' ἢ δι' ἐνὸς γράμματος, ὡς τὸν Τίτον, καὶ τὸν Λέκιον, καὶ τὸν Μάρκον· ἢ διὰ δυοῖν, ὡς τὸν Τιβερίον καὶ τὸν Κνέον ἢ διὰ τριῶν ὡς τὸν Σέξτον, καὶ τὸν Σερέιον. Ἔστιν ἔν καὶ ὁ Σπόριος τῶν διὰ δυοῖν γραφομένων, τῷ σ καὶ τῷ π. Γράφουσι δὲ διὰ τέτων καὶ τὲς ἀπάτορας ΣΙΝΕ ΠΑΤΡΙ, οἷον ἄνευ πατρὸς, τῷ μὲν σίγμα τὸ σίνε, τῷ δὲ πὶ τὸ πάτρι σημαίνοντες. Τῆτο ἔν τὴν πλάσιν ἐποίησε, τὸ διὰ τῶν αὐτῶν γραμμάτων τὸ σίνε πάτρι, καὶ τὸν Σπόριον γράφεσθαι⁷.*

⁷Quaest. Rom. 103.

Perhaps the best of all is that which *Plutarch* rejects: *promiscue nati, vulgo quæsitæ*, Σποράδην, if that indeed be a different Meaning from the Emperor's; for according to the Paraphrase of *Theophilus*, He must be so understood. The Etymology given by *Menage*⁸ has greatly the Fancy ⁸Amoen. I. C. and Spirit of that Author. He is worth consulting upon the occasion, ^{c. 39.} and I am pleased to send my Reader to him as often as I can.

ΝΟΘΗ. This word is borrowed from the Greeks, who distinguished between Νόθος and Γνησίος, as the Romans did between *Spurios* and *Iustos*.

Νόθοι τε πολλοὶ γνησίων ἀμείνονες⁹.†

⁹Euripid. Andromach. 638.

Νόθον, *qui non sit legitimus, Graeci vocant: Latinum rei nomen, ut Cato quoque in Oratione quadam testatus est, non habemus: itaque utimur peregrino*¹.

¹Quintilian. III. 6

Some have distinguished² with too great nicety between these two, as if *Nothus* was properly, *qui de Patre nobili et Matre ignobili gignitur: Spurius autem*, on the contrary, *qui de Matre nobili, et Patre ignobili nascitur*. For which I find no Foundation whatsoever. See more in *Fabretti*³, *Petit*⁴. How Γνήσιοι, Νόθοι, Σκότιοι, Παρθένιοι stand distinguished in *Homer*, see *Didymus* ad *Iliad*. Δ. 499. *Spurii*, are the *vage, vulgo, σποράδην, quæsitæ*. So the old Glosses, Σποράδην. *Vagerassim*. Or rather, according to a fine Conjecture, Σποράδην. *Vage. Passim*.

²Isidor. IX. Origg. 5.

³Inscript. p. 46.

⁴Legg. Attic. pag. 214.

* Cur eos, qui patrem certum non habent, SPURIOS appellant? Est quidem Graecis Σπέρμα Semen. Sed tamen verum non est, quod iidem putant, et rhetores in orandis causis afferunt, sic dictos quod promiscuo semine sint nati. Sed Spurius praenomen est, ut Sextus, Decimus, Caius. Porro non integra scribunt Romani praenomina, sed aut unica litera notant, ut Titum, Lucium, Marcum, [sic, T. L. M.] aut duabus, ut Tiberium, Cneium, [sic, Ti. Cn.] aut tribus, ut Sextum, Servium, [sic, Sex. Ser.] Spurius quoque duabus literis indicatur, Sp. Iisdem literis etiam Nothos significant S. P. nimirum SINE PATRE. Quae res errori ansam praebuit, cum Spurius et Incerto-patre-natus iisdem elementis notarentur.

† Multi Spurii praefant Legitimis.

(1). But besides these general Appellations, We sometimes find the particular One of *Vulgo Quaesiti*, or *Concepti*¹, opposed as it were to *Jure Quaesitis*². In the *Notae Juridicae*, which are preserved to us, We find I. N. Q. which is expounded *Iustus Nuptiis Quaesitus*. This is more particularly applicable to such as spring from that *Promiscua* and *Volgiva* Venus, which is known by the peculiar name of *Scortatio*.

(2). The Offspring of that unlawful Commerce, which is emphatically called *Stuprum*, forms another Class. *Stuprum* with the Romans differed from the last, and was that *quod committitur in Virgine vel Vidua honestae Existimationis*; by which last words was meant only the Woman, *quae corpore quaestum non fecerit*. So they thought proper to distinguish between *Prostitution* and *Frailty*.

(3). Such again as were the unlawful Produce of Adultery, were called *Filii Adulterini*.

(4). And in like manner the Issues of Incestuous Marriages, were *Filii Incestuosi*.

(5). To the Rank of Illegitimacy doubtless was referred (though I remember no name of distinction) all such as were born *ex Nuptiis injustis*; so They sometimes emphatically called a Match contracted and celebrated without the Consent of those, whose Consent was required,

³ J. 1. 10. pr. and by Law made necessary³.

*Impures enim Nuptiae et praeterea in villa sine testibus, et patre non consentiente, factae, legitimae non possunt videri, ac per hoc Spurius iste nascetur*⁴.

⁴ Apul. Metam. l. 6. pag. 115. Edit. Pric.

About the Age of *Constantine Imp.* the Roman Law attributed the name of *Natural Children* to another sort of Illegitimacy, which had a Being indeed, but no particular Description, before; unless *Filii ex Concubina nati*, or, *ex Concubinato*, shall be thought so. And now the Children of CONCVBINAGE, in conjunction with the Offspring of Slaves, by a peculiar Emphasis, passed under the Title of *Filii Naturales*. The Romans had been possessed for a long time of their *left-handed* or second-rate Wives; who were not unknown to the Law of the Country⁵, went through some form, (possibly as much as those Wives who did not contract the SOLEMN MARRIAGE) *et testatione interposita, sese alicui in Concubinatum dabant*.

⁵ D. 25. 7. 3. 1.
⁶ Reines. XIV. 183.
Add. Marcell. ad l. l. XII. Tabb. pag. 86, 87.
Cujac. V. Observ. 6.
Fabretti Inscrip. pag. 46.
Fr. Ramos del Manzano Schediasm. de Concubinis, apud Meerman. Thef. J. C. Tom. V.

P. CERVONIUS P. F. MARINVS
TESTAMENTO FIERI IVSSIT
SIBI ET CINCIAS SEX F. SECVNDAS
VXORI CILIAS CONCVBINAS.
LOCVM SEPVLTVRAE DONAVIT
C. VOLGIUS FVSCVS CON
LEGIO IVMENTARIORVM
PORTAE GALLICAE
POSTERISQVE EORVM OMNIUM
ET VXORIBVS CONCVBINISQVE.

Forosempronii.
The

The Union itself was a kind of *Licita Consuetudo*, was called *Semi-Matrimonium* and *Conjugium inaequale*: The Concubine, *quae Vxoris loco sine nuptiis in domo erat*, *ἡμίγαμος*, *Vice-Conjux*, *Convictrix*, *Vxor Gratuita*, *Amica*, etc.⁷; and sometimes *Matrona* and *Materfam.* almost with the same Propriety as the Lawful Wife, whom She is said to imitate; much in the same language as Adoption is said to imitate Nature. It must not be forgotten, that the Greeks had this kind of Wife also⁸.

Concubinage therefore may be thus defined: *Viri unius cum una muliere Consuetudo Legibus non incognita*. The Concubine, *Ea, quam quis non mariti animo, sed concubitus causa, sine stupri tamen crimine flagitioue, domi habet*. It is manifest from hence, that this Sort of Conjunction must be intitled to Privileges by the Roman Law, to which every other sort of *illicit*, or (to conform to their System and Sentiment) *lesshallow'd* Commerce was a Stranger: As the Certainty of the Father, upon which so much depended, was as well established, as in lawful Matrimony.

This Practice, to the great Scandal of Christianity, was by two Christian Emperors, *Constantine*⁹ and *Justinian*¹, not abolished, but regulated. The New Law stood thus: *Concubina est Mulier Libera, in-nupta, quam Vir coelebs domi concubinatus causa solam habet*. Both Parties by this Regulation were to be single: which Circumstance by the old Law, or at least by former Usage, was required (*Adulterii declinandi causa*) of the Woman alone. And secondly, the Indulgence granted to Concubinage was not to be extended to such as had more Concubines than one. It was attended also with some Restraints and Disabilities, not very material to be mentioned here.

Thus stood this Reproach, warranted, as it were, by Law and Constitutions, till at last it was abrogated by one of the Emperor *Leo*², intitled,

VT CONCVBINAM HABERE NON LICEAT.

Upon this Subject of Concubinage, see more in *Cujacius*³, and *Heineccius*⁴.

Bastardy, by general Consent of almost all Civilized Nations, will reduce a Person so circumstanced, to be considered, as it were, the first of his Family. For which reason he cannot by Law be Heir to his Father; for he has none, at least the Law knows of none⁵. And upon the same Principles, having no legal Relations, no body can claim a legal Succession to Him, except the Heirs of his Body, who spring from Him, and without whom he had had no Relations at all.

There is a notable Disquisition upon the State and Circumstances of Natural Children, by *Ant. Faber*⁶. To which may be added the following:

Palaeottus S. R. E. Cardinalis, de Nothis et Spuriis.

Budaeus Annot. Pr. in Pandect. pag. 134. seq.

Cujacius V. Observ. 6.

Hotoman. I. Var. Disp. 4.

Raevard. II. Conject. 5.

M m

(2). NVPTIAE.

⁷ See D. 50. 16.

¹⁴⁴
D. 32. 1. 49.

§ 4.

34. 9. 16. 1.

39. 6. 31. pr.

C. 5. 27. 3.

Sueton. in

Vespas. 3.

Paul. Sentent.

Lib. II. Tit.

XX. § 1.

⁸ Not. ad De-

mosth. c.

Neuer. T. III.

pag. 624.

⁹ C. 5. 26. vnic.

7. 15. vlt.

¹ Nov. 18. 74.

and 89.

² Nov. Leon.

91.

³ III. Observ.

18.

⁴ ad L. Juliam

and Pap. Pop-

pacam, II. 4.

⁵ D. 1. 5. 23.

⁶ Jurisprud.

Papinian.

Tit. de Nu-

ptiis, Princip.

II. Illat. I.

(2). NVPTIAE.

Defin. *Nuptiae sunt Conjunctio Maris et Feminae : Consortium omnis Vitae : Divini et Humani Juris Communicatio*¹.

¹ D. 23. 2. 1.

The proper Word for *Lawful Wedlock* with the Romans was *Nuptiae*.

Nuptiae. Justum Matrimonium. Vet. Gloss.

Though indeed *Nuptiae* is more justly and significantly the Celebration of Matrimony. Whence *Modestinus*, a Roman Lawyer, intitled his Book *DE RITU NVPTIARVM*. Which is also the Rubric in the Digest², where this Matter is considered. See *Caius* quoted below³.

² Lib. XXIII. Tit. II.

³ pag. 279.

So *Scaevola*,

Virgini in hortos deductae ante diem tertium quam ibi Nuptiae fierent, cum in separata diaeta ab eo esset, die Nuptiarum, priusquam ad eum transfiret, et priusquam aqua et igni acciperetur, id est, Nuptiae celebrentur, obtulit decem aureos dono. Quaesitum est post Nuptias contractas divortio facto, an summa donata repeti possit?

¹ D. 24. 1. 27.

*Inter eos, qui Matrimonio coituri sunt, ante Nuptias donatio facta jure consistit, etiamsi eodem die Nuptiae fuerint consecutae*¹.

And hence it comes to pass, that *Nuptiae* with the Romans, and *Γάμος* with the Greeks, are frequently to be expounded of the Festivity, or *Epulum Nuptiale*, which was so common, and generally, so sumptuous upon these occasions.

² Dion. Cassius et Zonaras.

*Εγήμε [Caligula] Κορνηλίαν Ορεσίαν ἣν ἤρπασεν ἐν αὐτοῖς τοῖς ΓΑΜΟΙΣ, ΟΤΣ τῷ ἐγγεγνημένῳ αὐτὴν Γαίῳ Καλπερνίῳ Πείσωνι ΣΤΝΕΩΡΤΑΖΕ*¹.
I. e. *In Coena nuptiali quam celebrabat.*

³ Homer. Odyss. A. 225.

Τίς δαῖς, τίς δὲ ὄμιλος ὃδ' ἐπλετο; τίπτε δὲ σε χρεώ;
Εἰλαπίν', ἥδ' ΓΑΜΟΣ; ἐπεὶ ἐκ ἔρανος τάδε γ' εἰσὶν².*

A Passage very unhappily translated, where, in the Original, *Εἰλαπίνη* signifies one kind of *Convivium*, *Γάμος* a second, and *Ερανος* a third.

⁴ Id. Odyss. Δ. 2.

Πρὸς δ' ἄρα δώματ' ἔλων Μενελάε κυδαλίμοιο.
Τὸν δ' εὖρον ΔΑΙΝΥΝΤΑ ΓΑΜΟΝ πολλοῖσιν ἔτησιν,
Υἱέος, ἥδ' ἐϋγατρὸς ἀμύμονος, ᾧ ἐνὶ οἴκῳ⁴.†

K. ΑΛΛ' εὐτυχοίτην. Τίνι δ' ἐν ἡμέρᾳ γαμεῖ;

A. Οταν Σελήνης εὐτυχῆς ἔλθῃ κύκλος.

K. ΠΡΟΤΕΛΕΙΑ δ' ἤδη παιδὸς ἐσφάζας θεᾶ;

* *Quodnam epulum, quaeve haec turba est? quod vero te opus urget? Convivium? an Nuptiae? quoniam haud Symbolum haec sunt.*

† *Ad domum autem agebant Menelai gloriosi. Hunc vero invenerunt exhibentem nuptiale epulum multis sodalibus, Filii atque filiae eximiae, sua in domo.*

A. Μέλλω γ' ἐπὶ ταύτῃ καθεύδαμεν τύχῃ.

K. Καὶ πεῖτα ΔΑΙΣΕΙΣ ΤΟΤΕ ΓΑΜΟΥΣ ἐσύσερον⁴ ;||

Αλλὰ τῶν τοιούτων ἕνεκα, καὶ ΓΑΜΟΥΣ ΠΟΙΟΥΜΕΝ, καὶ τὰς ἀναγκασι-
τάτας παρακαλῶμεν⁵. §——

Λέγεται γὰρ ὡς ἐν Ἰππείᾳ ποτὲ τῷ μίμῳ ΓΑΜΟΥΣ ἐσιαθείς, καὶ πινὼν διὰ
νυκτός⁶ *——

Καὶ —— ΓΑΜΟΣ ἐγένετο ἐν Κανᾷ τῆς Γαλιλαίας. —— Εὐκλήθη δὲ καὶ
ὁ Ἰησῆς καὶ οἱ μαθηταὶ αὐτοῦ εἰς τὸν ΓΑΜΟΝ⁷. †

⁴ Euripid. I-
phigen. in
Aul. 716.

⁵ Demosth. c.
Onetor. I. n.
27. Ed. Par.

⁶ Plutarch. in
Anton. p. 74.
Ed. Bryan.

⁷ Joh. II. 1, 2.

So Nuptiae :

*Si Donationum ante Nuptias, vel Dotis Instrumenta defuerint, pompa
etiam, aliaque Nuptiarum celebritas omittatur*⁸ ——

⁸ C. 5. 4. 22.

*Non aliter intelligi conditionem esse adimplendam, vel non extenuandam,
nisi ipsa Nuptiarum accedat festivitas*⁹.

⁹ l. 24. eod.

*Nec ultra expectato, quam dum sacrificii gratia Claudius Ostiam pro-
ficisceretur, cuncta Nuptiarum solennia celebrat*¹.

¹ Tacit. XI.
Annal. 26.

*Porrepto Ambrosiae poculo, Sume, inquit, Psyche, immortalis esto: nec
unquam digredietur a tuo nexu Cupido, sed istae vobis erunt perpetuae
Nuptiae. Nec mora, cum Coena nuptialis affluens exhibetur. Accum-
bebat summum torum maritus, Psychen gremio suo complexus*².

² Apul. Met.
l. 6. pag. 125.

Quadringenta dedit Gracchus sestertia, dotem

Cornicini, siue hic recto cantaverat aere.

Signatae Tabulae: dictum, Feliciter: ingens

*Coena sedet: gremio jacuit nova nupta mariti*³.

³ Juvenal. II.
Sat. 117.

This is that ΓΑΜΟΣ ἡμερῶν δεκάσσεσάρων, the Festival of fourteen Days
Continuance, that was made for the Marriage of Tobias⁴: As Twelve
was for the Daughters of Adrastus⁵.

⁴ Tobit VIII.
19.

And this will explain, what is otherwise inexplicable, a Fragment in
Stobaeus⁶,

⁵ Statius II.
Theb. 306.

⁶ Serm. 68. fin.

ΓΑΜΟΥΣ εὐτελεῖς καὶ ἰσοτίμους ποιεῖν ‡.

This Nuptial Festival had a good deal of Religion blended with it: nor
was Sacrifice wanting upon the Occasion, of which the Ancients were so
liberal, and which enter'd into most of their Civil Transactions, as Servius⁷
Aen. 136.

⁷ ad Virg. III.
Aen. 136.

|| C. Sint igitur beati. Quo vero die ducet eam?

A. Quum Lunae felix venerit orbis.

C. Jamne maestas Deae initiales victimas nuptiarum filiae?

A. Maestabo. Nam in hoc negotio jam sumus occupati.

C. An vero deinde celebrabis convivium nuptiale?

§ Sed harum rerum gratia, et Nuptialia Festa celebramus, et maxime propinquos invi-
tamus.——

* Ac fertur, quum ad Hippiae mimi nuptias invitatus totam noctem perpotasset——

† Et erat Festum Nuptiale in Cana Galilaeae—Vocabatur autem Jesus et discipuli ejus ad
Festum.

‡ Nuptiale Festum frugale sit, et par tuae Conditioni.

writes: *Apud Veteres neque Vxor duci, neque Ager arari sine sacrificiis per-*
aetis poterat. So *Spatium vocandi, sacrificandi*⁸. Θεοὶ γάμον ἐξέτελειον⁹.
 Like the *Benedictio Sacerdotalis*. So *Didymus* upon *Homer*¹, expounds
 Σκότιον υἱόν, a Son born ἐξ ΑΔΑΙΔΟΥΧΗΤΩΝ γάμων. Something like a
 Son born of a Clandestine Marriage. And this was a distinguishing
 Circumstance between Marriage and Concubinage :

Τῆς αὐτῆς ἀρετῆς ἐστὶ καὶ τὸ πειθεῖσθαι Κροτωνιάτας ἀπέχεσθαι τῆς ΑΘΡΟΤΟΥ
 καὶ νόθης πρὸς τὰς παλλακίδας συνουσίας². §

² Jamblich.
 in v. Pythag.
 c. 31.

Where We are informed by a marginal Scholium : Ταῖς γὰρ μηνσαῖς
 συνοικεῖν μέλλοντες ἔθυσον, ταῖς παλλακίσι δὲ, ἑδαμῶς. ||

Nuptiae, say they, comes from *Nubendo*. *Nuptias dictas esse ait Santra*
ab eo quod Nymphaea dixerunt Graeci antiqui γάμον inde novam nuptam
νέαν νύμφην. Cornificius, quod nova petantur Conjugia. Curiatius, quod nova
pacio fiat. Aelius et Cincius, quia Flammeo Caput nubentis obvolvatur, quod
*Antiqui obnubere vocarunt*³. For the Bride, whose Modesty was much
 consulted upon this delicate occasion, was conveyed to the House of her
 intended Husband, with her Head covered. The Covering was yellow or
 clay-colour, and had the peculiar name of *Flammeum*. The Remains
 of *Trypho* an excellent Sculptor of Antiquity, in his Marriage of *Cupid*
 and *Psyche*, and the *Nuptiae Aldobrandinae*, a very curious Piece of Roman
 Work, now in the *Villa Aldobrandina*, exhibit this Particular in a very
 sensible manner, and likewise happily illustrate that Verse of *Lucan*,
 which is so expressive of this part of the Ceremony :

³ Festus.

*Lutea demissos velarunt Flammea vultus*⁴.

⁴ Lucan. II.
 362.

Et sonus tibiae Zygiae mutatur in querulum Lydium modum: cantusque
laetus Hymenaei lugubri finitur ululatu: et puella nuptura deterget
*lacrymas ipso suo Flammeo*⁵.

⁵ Apul. Me-
 tam. l. 4. pag.
 86. Edit. Pric.

Ipse per licita atque illicita foedatus, nihil flagitii reliquerat, quo cor-
ruptior ageret, nisi paucos post dies uni ex illo contaminatorum
grege, cui nomen Pythagorae fuit, in modum solennium conjugiorum
denupsisset. Inditum Imperatori Flammeum. Visi auspices, dos,
et genialis torus, et faces Nuptiales, cuncta denique spectata, quae
*etiam in femina nox operit*⁶.

⁶ Tacit. XV.
 Annal. 37.

Puerum Sporum——in muliebre naturam transfigurare conatus est:
cum dote et Flammeo, per solenne Nuptiarum, celeberrimo officio,
*deductum ad se pro uxore habuit*⁷.

⁷ Sueton Ner.
 § 29.

It seems to have been a Ceremony in the Christian Church, for some
 time at least, that Women should be veiled, particularly, during that So-
 lemnity. *Isidore*⁸ endeavours to account for it, by telling us, that it was

§ *Ad temperantiam quoque referendum est, quod Crotoniatis persuasit, ut a profano [sine*
sacrificiis peracto] et spurio pellicum commercio se abstinerent.

|| *Qui feminas rite desponsatas ducturi erant domum, sacrificia peragebant: qui vero Con-*
cubinas, non.

meant

meant to put the married Woman in mind of her Subjection, and the Obeisance She owed her Husband. Something more upon this head in a Dissertation of *Jac. Gothofred, De velandis mulieribus*, where he attempts an Explanation of that famous Text of St. Paul, *Διὰ τὸτο ὁφείλει ἡ γυνὴ ἐξουσίαν ἔχειν ἐπὶ τῆς κεφαλῆς*?

⁹1 Cor XI. 10.

*Ipsae enim sunt, quas subiectas esse oportet: propter quas Potestas supra caput haberi debet. Velamen jugum illorum est*¹.

¹ Tertullian. de Virg. Veland.

It is for these Reasons, that the words *Nubere, Nuptum*, etc. are not applicable to the Bridegroom. Whence *Martial* very facetiously²:

² VIII. 12. 1.

*Vxorem quare locupletem ducere nolim,
Quaeritis? Vxori nubere nolo meae.*

Hence, when said of the Man, it was understood of that Abomination, *quod non proficit scire*, as the Emperors *Constantius* and *Constantinus* very well express it³.

³ C. 9. 9. 31.

*Barbatus rigido nupsit Callistratus Apro,
Hac qua lege viro nubere Virgo solet.
Praeluxere faces, velarunt Flammea vultus,
Nec tua defuerunt verba, Thalasse, Tibi.
Dos etiam dicta est. Nondum tibi, Roma, videtur
Hoc satis? Expectas nunquid et ut pariat*⁴?

⁴ Martial. XII. 42.

In the same manner as *Nubere* was appropriated to the other Sex, so was *Ducere* to Ours;

*Custodes das, Polla, viro; non accipis ipsa:
Hoc est uxorem ducere, Polla, virum*⁵.

⁵ Id. X. 69.

And that with great justness and propriety. For *Domi-ductio* was a principal Ceremony in the Nuptials of Antiquity; And the House, where the *Nova Nupta erat ducenda*, was not Hers, but the Husband's, the *Domicilium Matrimonii*, as it is elegantly expressed by *Pomponius* in the Law to be next cited. She was to leave the Habitation and Fortunes of the Family She sprang from, and by this Solemnity shewed that She now incorporated into those of her Husband.

*Mulierem absenti per literas ejus vel per nuncium posse nubere placet, si in domum ejus deduceretur: eam vero, quae abesset, ex literis vel nuncio suo duci a marito non posse: deductione enim opus esse in Mariti, non in Vxoris domum, quasi in domicilium Matrimonii*⁶.

⁶ D. 23. 2. 5.

Domi-ductio was looked upon as Consummation: and what gave the form and last hand to the Contract. Till that time the Bride was *Sponsa*, and no longer.

Cum in te simplicem donationem dicas factam esse die Nuptiarum, et in ambiguum possit venire, utrum a Sponso an a Marito donatum sit: sic distinguendum est, ut, si in tua domo donum acceptum est, ante Nuptias

*C. 5. 3. 6.

*ptias videatur facta esse donatio: quod si penes se dedit Sponsus, retrahi possit: Vxor enim fuisti*⁶.

7D. 35. 1. 15.

*Cui fuerit sub hac conditione legatum, SI IN FAMILIA NVPSISSET, videtur impleta conditio, statim atque ducta est Vxor, quamvis nondum in cubiculum mariti venerit. Nuptias enim non Concubitus, sed Consensus facit*⁷.

8 ad D. 24. 1.

66.

35. 1. 15.

This Celebrity of *Domi-ductio* is well described (it is too much to dwell upon here) by those who have illustrated the Rituals and Ceremonies of the Roman Nuptials, *Briffonius* particularly, *Casalius*, *Ant.*

Hotoman, and *Dion. Gothofred*⁸.

Indeed the Rites and Ceremonies which attended this Celebration, were very numerous; and many are upon Record. I may possibly be induced in the course of these Papers to speak to one or two of them, which, I think, have not yet been well accounted for. In the mean time I should think, that from the ancient Sculptures, Medals, Bas-Reliefs, Paintings, *etc.* a great Light might be thrown upon this Subject. It is too copious and extensive for my present Design: it may not possibly be thought so, if I have either leisure or encouragement to enlarge it.

But to return to my Etymology of *Nuptiae*. Though several of the Ancients, as We have seen, deduce it a *Nubendo*, i. e. *Tegendo*, and many Passages are not wanting to support that Etymology, yet is it much more reasonable to suppose with a good Writer, who has managed this Subject very successfully, that it is very unlikely it should take its name from so inconsiderable a Circumstance. *Quod tegetur Caput, Nuptiae dictae*⁹. I should scarce believe it. There is a Hebrew Radix¹ consisting of the same Elements, which signifies *Procreation, Increase, Fruit, Birth, and Production*: which being the very end and design of this Institution, I think bids much fairer for the Etymon, than any that can be well assigned. This was both the Letter and the Spirit of the Contract; for the Stipulation was attended with this Profession or Declaration, *LIBERORVM QVAERENDORVM CAUSA*². It is remarkable that the Greeks distinguished their Lawful Matrimony by the same Form of Expression:

¹ Isidor. Etymol. IX. 8.

¹ Isai XXVII. 6.

Cypraeus de Matrimon. Cap. I.

² Jamblich.

Vit. Pythag.

C. 31.

Epit. Liv. Lib.

59.

D. Augustin.

Serm. 244.

and C. 5. 4. 9.

³ Isidor. Pelusiot. III. Epist.

243.

⁴ in Timone

§ 17.

⁵ Charit. Aphrodis. III. 2.

Παρ' Αθηναίοις συνάφεια κατὰ νόμον ΕΠ' ΑΡΟΤΡΩΙ ΠΑΙΔΩΝ ἐλέγετο γίγνεσθαι³. *

Αρότρω [*Aratro*] is not the word here, as many have observed, but ΑΡΟΤΩΙ [*Aratione*.] So *Lucian*, alluding to this very Practice⁴,

Εἰ δὲ τις ἔμπαλιν ἐλευθέραν γυναῖκα εἰς τὴν οἰκίαν νόμῳ παραλαβὼν ΕΠ' ΑΡΟΤΩΙ παίδων γνησίαν † —

Εξω σε γαμετὴν παίδων ΕΠ' ΑΡΟΤΩΙ κατὰ νόμους Ἑλληνικὰς⁵. †

* *Apud Athenienses Legitima Conjunctio Proles ferendae causa facta esse dicebatur.*

† *Si quis contra Vxorem lege domum duxerit ad liberorum sationem —*

‡ *Te Vxorem habebis liberorum ferendorum causa juxta leges Graecorum.*

Τοῦτα

Τοιγαρὲν αὐτίκα τῆς αἰσχρᾶς αὐτὴν ἀπέστησεν ἐργασίας, καὶ ἐπ' ΑΡΟΤΩΙ
παίδων γνησίων ἐρωμένην ἡγάγετο γαμετὴν⁶. §

⁶ Aristæn. I.
Epist. 19.

Ἀθηναῖοι τρεῖς ΑΡΟΤΟΥΣ ἱερὰς ἄγουσι, πρῶτον ἐπὶ Σκίρῳ, τῷ παλαιοτάτῃ τῶν
σπόρων ὑπόμνημα, δεύτερον ἐν τῇ Ραρίᾳ, τρίτον ὑπὸ πόλιν, τὸν καλέμενον
βεζύγιον. ΤΟΥΤΩΝ ΔΕ ΠΑΝΤΩΝ ΙΕΡΩΤΑΤΟΣ ΕΣΤΙΝ Ο ΓΑ-
ΜΗΛΙΟΣ ΣΠΟΡΟΣ ΚΑΙ ΑΡΟΤΟΣ ΕΠΙ ΠΑΙΔΩΝ ΤΕΚΝΩΣΕΙ⁷. ||

⁷ Plutarch.
Conjug. Prae-
cept.

The Roman Marriages were of two Sorts, *Solennes* and *Minus Solennes*.

*Legitimae sunt Nuptiae, si Romanus Romanam, Nuptiis intervenien-
tibus, vel Consensu, ducat uxorem⁸.*

⁸ Cui Instit.
L. 1. Tit. 4.
§ 1.

The *Solennes* again were either

VSV,
FARRE,
OR COEMPTIONE.

*Vxores enim Dii habent, atque in Conjugalia foedera conditionibus
veniunt ante-quaeftis: usu, farre, coemptione genialis lectuli sa-
cramenta condicunt⁹.*

⁹ Arnob. adv
Gent l. 4 pag^r

Τὸ δὲ γυναικῶν εἴτις συγγίγνοιτο τινὶ, πλὴν ταῖς μετὰ θεῶν καὶ ΙΕΡΩΝ
ΓΑΜΩΝ ἐλθέσαις εἰς τὴν οἰκίαν, ΩΝΗΤΑΙΣ, εἴτε ΑΛΛΩΙ ΟΤΩΙ
ΟΥΝ ΤΡΟΠΩΙ κτηταῖς¹. *

140.
Add. Boethius
ad Cicer. III.
Topic.

*Tribus modis apud Veteres Nuptiae fiebant, vsv, si, verbi gratia, Mu-
lier anno uno cum viro, licet sine legibus, fuisset: FARRE, cum per
Pontificem Maximum et Dialem Flaminem, per fruges et molam
falsam conjungebantur, unde Confarreatio appellatur, ex quibus
Patrimi et Matrими nascebantur. COEMPTIONE vero, atque in
manum conventionem, cum Illa in Filiae locum, Maritus in Patris
veniebat, ut si quis prior fuisset defunctus, locum hereditatis justum
alteri faceret².*

Pithoei Not.
ad Pariator.
Tit. 16.
¹ Plato de LL.
l. 8.

It may be proper to be acquainted with the Distinction, though Dis-
use has made it less interesting.

² Servius ad
Virg. I. Georg.
31.

1. vsv. By this is meant *Prescription*. When a Woman lived with a
Man for the space of a whole Year, *Matrimonii ergo*, She became his
Property by Prescription, *Vsu capta fuit*, like other moveable Goods,
by the Law of the XII Tab. Till the Year was expired, She was
called *Vxor* or *Matrona* only, not *Mater familias*³.

³ Gell. XVIII.
6.

§ Quo circa a turpi quaeſtu eam excitavit, atque amasium suum in Vxorem legitimam duxit
liberorum ferendorum gratia.

|| Athenienses tres arationes sacras obeunt, unam in Sciro, antiquissimae Segetis monumentum;
secundum in Rarea; tertiam sub ipsa urbe, quam a jugo bouum Buzygium nuncupant. His
omnibus sanctior est aratio atque satio procreandorum liberorum.

* Quod si quis cum muliere quadam congregiatur, haecenus tantum faciet, si illam sacro Ma-
trimonio, praesentibus deorum auspiciis, domum adduxerit, sive emptam, sive justo alio modo
comparatam—

And

And moreover, an absence of three Nights would interrupt the *Vsu-*

⁴ Gell. III. 2. *capion*⁴, or Prescription, according to the same System of Law. Which
⁵ D. 41. 3. 2. Interruption was called *Vsurpatio*: *Vsurpatio est Vsucapionis Interruptio*⁵.
Above p. 208.

This Use or Cohabitation, was the simplest Form of Solemn Wedlock among the Romans, and perhaps the oldest. Such as prevailed at the Foundation of the Empire, when the young Romans, at the Rape of the Sabines, took themselves Wives, and made them so with no other Ceremony, than that of Prescription.

2. The second Solemn Marriage with the Romans was FARRE, or
⁶ Dionys. Ha- as it is sometimes called, CONFARREATIONE⁶.
lic. II. 25.

*Farre convenitur in manum, certis verbis et testibus decem praesentibus, et solemni sacrificio facto, in quo panis quoque Farreus adhibetur*⁷.
*In sacris nihil religiosius Confarreationis vinculo erat: novaeque nuptae farreum praeferebant*⁸.

⁷ Vlpian Tit.
IX. § 1.
Add. XI. 13.
XXII. 14.

⁸ Plin. XVIII.
2.

It appears from hence, that this was a Contract attended with a particular kind of *Sacrifice*, and moreover attested by proper Witnesses. And a Marriage thus contracted was to be dissolved by another Sacrificial Solemnity, which was called *Diffarreatio*.

Of all the Marriage Ceremonies This was the most solemn and religious: and its Effects the most considerable. Γυναῖκα γαμετὴν κατὰ νόμους ἱερὰς συνελθῆσαν ἄνδρὶ κοινωνὸν ἀπάντων εἶναι χρημάτων τε καὶ ἱερῶν ἀπάντων, καὶ κληρονόμον, τὸν αὐτὸν τρόπον ὥσπερ καὶ πατρὶ θυγάτηρ⁹. *

⁹ Dionys. Ha-
lic. I. c.

¹ pag. 75.

I have observed above¹ upon the nature of *Sacra Domestica*, that they were guarded with a very particular Attention, and communicated only upon the most weighty Considerations. A Marriage therefore which convey'd such an important Right, must be of all the most ritual, and required therefore, as We have seen formerly², the Attendance of the *Pontifex Maximus*, who had the Super-Intendency in all Matters of a Religious Nature.

² pag. 76.

This Solemnity was gone into Desuetude about the time of *Tiberius*, according to the words of *Tacitus*:
³ IV. Annal. 16.

Confarreandiconsuetudinem aut omisfam, aut inter paucos retentam fuisse.

3. The Third and last Ceremony was COEMPTIONE.

*Coemptio est, ubi Libra atque Aes adhibetur, et Mulier atque Vir inter sese quasi Emptionem faciunt*⁴.

⁴ Servius ad
Virgil. IV.
Aen. 103.

Coemptio certis solennitatibus apud priscos peragebatur in contrahendo Matrimonio, et sese coemendo Vir et Vxor interrogabant. Vir ita: AN MULIER SIBI MATERFAM. ESSE VELLE? Illa respondebat, VELLE. Item Mulier interrogabat, VIRVM VIR SIBI PATERFAM. ESSE VELLE? Ille respondebat, VELLE. Itaque Mulier in Viri

* Vxorē quae convenit cum Viro juxta leges sacras, participem esse omnis substantiae, omnique sacrorum, et heredem esse ita uti Filia Patri est.

manum

*manum conveniebat, et vocabantur hae NVPTIAE PER COEMPTI-
NEM, et erat Mulier Materfam. Viro, loco Filiae*⁵.

⁵ Id. ad IV.
214.

Which may not unsuccessfully be compared with some of our Mo-
dern Rituals.

Servius again upon this Passage of *Virgil*⁶,

⁶ I. Georg. 31.

Teque sibi generum Tethys emat omnibus undis,

has the following Note :

*Quod autem ait EMAT, ad antiquum Nuptiarum pertinet ritum, quo
se Maritus et Vxor invicem coemebant, sicut habemus in Jure.*

Tribus enim modis apud Veteres Nuptiae fiebant, Vsu——

*Nubentes veteri Lege Romana assēs tres ad maritum venientes solebant
ferre, atque unum, quem in manu tenerent, tanquam emendi causa,
marito dare : alterum, quem in pede haberent, in foco Larium fa-
miliarium ponere : tertium in sacciperio cum condidissent, compito
vicinali solere resignare*⁷.

⁷ Nonius Mar-
cellus XII. 50.

This *Coemptio* is sufficiently explained by the Writers of Roman Anti-
quities⁸. It appears to me to be a kind of EARNEST, as We call it, viz. the Money which was advanced, *Dicis causa*, in all Contracts, of which this Treaty had a great Relish : though it was not strictly a Contract to all manner of purposes, in the Apprehension of the Roman Law.

⁸ Brissonus,
Rofinus,
Dempster, etc.

I am the more confirmed in my Opinion from the first Quotation of *Servius*⁹ upon this occasion. The *Aes* and the *Libripens*, that *Form*⁹ pag. 280. of Bargain and Sale had a place in many other Conveyances, as all know, who are acquainted with the usual Transactions of *Emancipatio*, *Testamenti-factio*, etc.

But whatever it was, I think, it was not peculiar to the Romans, as *Plato* will witness for me¹.

¹ pag. 279.

So *Euripides*,

Γυναῖκες ἐσμὲν ἀλιώτατον φυτὸν,
ὡς πρῶτα μὲν δεῖ χρημάτων ὑπερβολῇ
ΠΟΣΙΝ ΠΡΙΑΣΘΑΙ².*

² Medea v.
232.

We find an old Custom of the *Thracians*, among others, for the Husband to purchase his Wife of her Relations : Thus *Scuthes*³ says,

Σοὶ δ', ὦ Ξενοφῶν, καὶ θυγατέρα δώσω, καὶ εἴ τις σοὶ ἐς θυγάτηρ, ΩΝΗ-
ΣΟΜΑΙ Θρακίῳ νόμῳ†.

³ Xenoph. A-
nab. l. 7. pag.
541. Edit.
Hutchins.

Πωλεῦσι [Thracians] τὰ τέκνα ἐπ' ἐξαγωγῇ· τὰς δὲ παρθένους ἐφυλάσσεσι,
ἀλλ' ἐῷσιν οἷσι αὐταὶ βέλονται ἀνδράσι μίσγεσθαι· τὰς δὲ γυναῖκας
ἰσχυρῶς φυλάσσεσι, καὶ ΩΝΕΟΝΤΑΙ τὰς γυναῖκας παρὰ τῶν γονέων
χρημάτων μεγάλων⁴.||

⁴ Herodot.
Terpsich. init.
Add. Arnif.
de Jure Con-
nub. pag. 10.

* Nos mulieres sumus miserrima propago,
Quas primum quidem oportet maximis opibus
Maritum emere.

† Tibi vero, *Xenophon*, etiam filiam dabo, ac si tibi filia est, eam more Thracico emam.

|| Liberos sub conditione avehendi venundant : virgines autem non asservant, sed quibus libuerit

N n

I do

* II. Polit. 6. I do not think this Passage, which is alleged from *Aristotle*⁴, comes up to the Point, viz.

Τὲς γὰρ ἀρχαῖες νόμους λίαν ἀπλῆς εἶναι καὶ βαρβαρικὰς. Εἰδηροφοροῦντό τε γὰρ οἱ Ἕλληνες, καὶ τὰς ΓΥΝΑΙΚΑΣ ΕΩΝΟΤΥΝΤΟ ΠΑΡ' ἈΛΛΗΛΩΝ. ὅσα τε λοιπὰ τῶν ἀρχαίων ἐςί πε νομίων, εὐήθη πάντων ἐστίν.*

This is not like treating of a Nuptial Ceremony, and such a Ceremony as was in use when the Author wrote. It is a different thing, when *Men parted with their Wives for Money*, if that be the sense of the Place, which I am inclined to believe.

THESE TWO last Solemnities wrought each of them an Effect, which the Former did not. And That was *Conventio in Manum* :

*Genus enim est Vxor : ejus duae Formae ; una Matrumfam. earum, quae in manum convenerunt ; altera, earum, quae tantummodo Vxores habentur*⁵.

⁵ Cic. Topic. 3.

The Woman was to the Husband in the Place of a Daughter : and He to Her as a Father. They were the One to the Other *sui Heredes*, and the Survivor succeeded to the Estate of the Other :

*Coemptione vero atque in manum Conventione cum Illa in Filiae locum, Maritus in Patris veniebat, ut si quis prior fuisset defunctus, locum hereditatis justum alteri faceret*⁶.

⁶ Servius in Virgil I. Georg. 31.

*Vxor quoque quae in Manu ejus est, sua heres est, quia filiae loco est*⁷.

⁷ Pariat. LL. Mos. et Rom. Tit. XVI.

That She was in *loco Filiae*⁸ upon this Occasion, there are many Proofs. She acquired nothing for herself (which was the case of Children and Slaves) but for her Husband :

⁸ Dionys. Halic. above pag. 280.

*Quandocunque in manum convenerat, omnia protinus, quae doti dicebantur, marito serviebant*⁹.

⁹ Serv. ad Virgil. I. Georg. 31.

*Cum mulier viro in manum convenit, omnia, quae mulieris fuerunt, viri fiunt dotis nomine*¹.

¹ Cic. Topic. 4.

And accordingly, like Children and Slaves, She might have her *Peculium*, or private Property, *permittente DOMINO*. For that also was the name which the Husband, upon this Principle, had a right to, and to which *Virgil* is supposed to allude,

Connubia nostra

*Reppulit, ac Dominum Aenean in regna recepit*².

² IV. Aen. 214.

³ D. 24. 1. 57. C. 3. 29. 8. 1.

⁴ Amoen. J.C. Cap. 25.

And this Term We find in some Passages of the Roman Law³. But of this *Menage*⁴ may be consulted at leisure. Time indeed, and Compliance to the Fair Sex, invested the Ladies also with the Character and

cum viris concumbere sinunt : at uxores asservant vehementer, easque magno aere a parentibus coemunt.

* *Antiquiores leges valde simplices esse et rudes. Graeci enim ferro incedebant armati, et uxores a se invicem coebebant. Et quaecunque praeterea restant legum antiquissimarum, sunt absurdissima.*

Appel-

Appellation of *Domina*⁵. But surely it was a great Revolution of Language, that could justify the following Epitaph:

D. M.
AEMILIO VALERIO
CHORINTO HOMINI BONO
QVI VIXIT ANN. XL.
DEFUNCTO HONORIBVS AEDILICIIS
ANTONIA TORTONIA
MARITO OBSEQUENTISSIMO
B. M. F.

⁵ See Fabrett. Inscript. pag. 580. Menag. l. c. Forner. I. Select. 11. A. Faber. add Tit. de Nupt. pag. 232.

So Apuleius has *Obsequentissimum Maritum*⁶.

The Husband had also the Power of Life and Death over Her, as over her own Children; and like them She was called by his Name also; as *Heineccius*, who has well explained the Circumstances of *In Manum Conventio*⁷, will inform you from the best Authority.

⁶ Apolog. pag. 474. Edit. Scip. Gentilis. Vid. Casaubon. ad loc.

If from nothing else, however from the *Participatio rerum sacram*, it is evident that She was *sub potestate Mariti*, and classed with his Children, who are always described by *Constituti, Manentes, Relicti in sacris paternis*⁸. So in the old Glosses: *In sacris Parentum esse: ὑπὸ τὴν ἐξουσίαν τοῦ πατρὸς εἶναι*. And This is the Expression when the Adopted leave the Power of the Natural Father, and pass over into that of the Adopter:

⁷ Antiqq. Rom. ad Infit. Lib. I. Tit. X. § 6. seq.

⁸ See Gothofred. ad C. 8. 48 10. 1. and C. 5. 70. ult. pr. Add. C. 6. 61. 2. 3. 28. ult. 2.

*Et aliquantulum adjuvabat heredes, quod M. Annaeus in Sufenatis familiam ac sacra transferat*⁹.

⁹ Valer. Maxim. VII. 7. 2.

Before I take leave of this Subject, let me observe

1. That *Confarreatio*, or the Solemnity of Sacrifice, does not seem to constitute a new or distinct Species of *Nuptiae*: but is only a religious Rite, which either attended the Marriage Contract or not, *pro arbitrio*.
2. That *Confarreatio, Coemptio*, etc. were not peculiar to the Roman Constitution, as We can gather from the Passage which I have produced from *Plato*: And that the *ἱερὸς γάμος* of that Writer, and the *ἱερὸς νόμος* of *Dionys. Halic.* mean pretty much the same thing.
3. That some People have concluded, that the *Vxor Vsu capta*, i. e. after any one compleat Year, without Interruption of Usage, and not till then, was as much *in Manu et Mancipio Viri*, or did *convenire in Manum Mariti*, as by any other solemn way of Marriage¹. And this, they say, is supported by a Passage in *Tully*².

¹ Pithoeus ad Pariat. Tit. XVI.

In Manum, inquit, convenerat. Nunc audio. Sed quaero, Vsu an Coemptione.

² Pro L. Flacco, § 34.

But this is very precarious: As some MSS. there read *Manum*, and some support *Matrimonium*.

Thus much for the *Solennes Nuptiae*. But as Consent is the very Essence and Foundation of Matrimony³, the Solemnity was very often waived⁴, when this Consent or Covenant admitted of any other kind or method

³ D. 50. 17. 30. ⁴ D. 35. 1. 15. C. 5. 4. 22.

thod of Proof : for one great end and design of these Solemnities was to attend the Contract, and render it notorious.

Again. Consent forming a Contract, and Contracts being generally attended with *Deeds* or *Writings*, so also were these Matrimonial Contracts sometimes attended, for Security or Notoriety sake, with what were called the *Nuptialia Instrumenta*, or, *Tabulae Nuptiales*. But these, like Marriage Settlements, which are of no Avail but with the Wealthy and the Prosperous, were often superseded, and the Consent and Concurrence was left to be gathered by any other Conclusion that could be made³.

³ D. 20. 1. 4.
22. 4. 4.
C. 5. 4. 9.

When Marriage came under Ecclesiastical Cognizance and Jurisdiction, this Union, by simple Consent alone, became discountenanced. It was then that *Banns* or *Proclamation*, that the *Benedictio Sacerdotalis* etc. were required ; and the Distinction between Public and Clandestine Marriages grew into use. Concerning which see *Gothofred* upon *Leo's* Constitutions⁴. Marriages of the last Sort, *i. e.* Clandestine, have in some Countries been held valid, and indissoluble, after they were once contracted, and the Children legitimate that spring from them : in others not. Concerning which something in my last cited Author.

⁴ Leon. Nov.
89.

A Marriage with the Romans contracted *solo et nudo Consensu*, or again, attended with the Celebration of those Rights of which I have been discouraging, is supposed by some to constitute the difference between *Matrimonium* and *Nuptiae*. We have also seen another difference before⁵ and We have moreover observed, that They are often confounded and used promiscuously by the ancient Writers, as well Lawyers as others⁶.

⁵ Above pag.
269.

⁶ J. 1. 9. 1.
3. 2. 1.
D. 23. 2. 10.
and 11.

(3). CONNUBIVM.

This is another Word for Matrimony, or perhaps something synonymous to *Nuptiae*.

⁷ Servus ad
Virg. I. Aen.
77.

*Connubium est Jus Legitimi Matrimonii*⁷.
*Connubium est Vxoris jure ducendae Facultas*⁸.

⁸ Vlpian. Tit.
5. § 3.

⁹ D. 35. 1. 10.
pr.

(4). CONJUGIVM.

This also differs only in Name : as is plain from *Vlpian*, who⁹ calls Marriage, *Nuptiale Jugum*. It is to be noted, that, although the Idea of the Yoke be applicable to both Parties alike, and that they are called *Conjuges*, according to *Festus*, *tanquam ejusdem Jugi pares*, yet in the better Ages, with the Prose-Writers at least, the Word *Conjux* is never used for the Husband, but constantly for the Wife alone¹.

¹ Fabrett. In-
script. p. 298.

(5). CONSORTIVM.

² D. 23. 2. 1.

Nuptiae sunt Consortium omnis vitae. Modestinus².

This Expression has its use in denoting what in our Marriage Ceremony is described in these Words : **For Better for Worse.** *Consortium. Eadem Condicio : Eadem Fortuna.*

Quid

Quid enim tam humanum est, quam ut fortuitis casibus mulieris maritum, vel uxorem viri participem esse?

³D. 24. 3. 22.
7.

This Community, or kind of Partnership, (notwithstanding what We have observed before of the Dominion of the Husband, even over the Person of his Wife, who was *in ejus manu et potestate*) was partly intended by the Roman Law, and is supported by many favourable Constructions in it: where the Wife appears to be a kind of *Com-Domina*⁴. And therefore, out of Tenderneſs for this Alliance, and in honour of the married State⁵, An Action of Thievery or Larceny did not lie against the Wife after Separation, but, what had a softer name, *Actio Rerum Amotarum*.

*Rerum amotarum judicium singulare introductum est adversus eam quae uxor fuit: quia non placuit cum ea furti agere posse; quibusdam existimantibus, ne quidem furtum eam facere, ut Nerva, Cassio, quia Societas Vitae quodammodo dominam eam faceret*⁶.

⁶ l. 1. eod.
Add. D. 42. 1.
52.
Rutgers. ad
Hor. 1. Od. X.
10.

Again. They were given to understand, that They had in great measure all things in common between them, by the great Care which their Law took to restrain Donations between Husband and Wife: a Point, with which their Books are much taken up. This I prefer to the other Reasons which have been brought to discourage that species of Alienation. And *Plutarch*⁷, who recites many, gives the preference also:

⁷ Quaest.
Rom. 5.

Διὰ τί δὲ δῶρον λαβεῖν ἀνδρὶ παρὰ γυναῖκος, καὶ γυναῖκι παρὰ ἀνδρὸς ἀπεί-
ρηται; — Η μᾶλλον ὅτι δεῖ KOINA καὶ γυναῖξιν εἶναι τὰ ἀνδρῶν, καὶ
ἀνδράσι τὰ γυναικῶν; μανθάνει γὰρ ὁ λαβὼν τὸ δοθεὶς, ἀλλότριον ἡγεῖσθαι
τὸ μὴ δοθεὶς.*

Lastly, it is visible in many parts of the Ceremony, as in the well-known Formulary,

VBI TV CAIVS, IBI EGO CAIA⁸.

so moreover in the symbolical Rite of Fire and Water, which made so considerable a share in the Nuptial Celebration, as to be accounted the very Essence of the Solemnity:

⁸ Plutarch.
Praecept.
Connub.

Quos faciunt justos Ignis et Vnda viros?

⁹ Ovid. II. de
A. A. 598.

—die Nuptiarum, priusquam ad eum transfret, et priusquam

Aqua et Igni acciperetur, i. e. Nuptiae celebrentur¹. —

¹ D. 24. 1. 66.
1.

Inde ubi sacrificas cum conjuge venit ad aras

Aesonides, unaque adeunt, pariterque precari

Incipiunt, Ignem Pollux Vndamque jugalem

*Praetulit*².

² Valer. Flacc.
VIII. Argo-
naut. 243.

Plutarch here again³ has many Solutions of this Ceremony. *Dionys. Halic.*⁴ leads us to the true one, when He calls it, KOINΩNIAN

πυρὸς καὶ
³ Quaest. Rom.
1.

* Cur Donationes inter Maritum et Vxorem prohibitaee sunt? — An haec est verior Ratio, quod mariti et uxoris omnia debent esse communia? Qui enim accipit quod datur, is discit pro alieno putare, quod datum non est.

⁴ II. 30.

ὑδατος.

ὑδατος *. It expresses, that the Accommodations of Life are in common to both: Accommodations, which are not to be procured without the Intervention of Fire and Water. For which reason, the use of those Elements was interdicted those, who were under sentence of Banishment:

An, quod in his vitae causa est; haec perdidit exsul:

His nova fit Conjunx: haec duo magna putant?†

Aqua ad Ignis interdici solet damnatis, quam accipiunt Nuptae: videlicet, quia hae duae res humanam vitam maxime continent.*

⁷ Ovid. IV.
Fast. 791.

⁸ Festus in v.
Add. Cujac.
XI. Observ. 2.
Lactant. II. 9.
Not. ad Ovid.
II. de A. A.
598.
Bernartius ad
Stat. XII.
Thebaid. 189.

⁹ Above, pag.
263.

¹ Homer. O.
dyss. H. 68.

² Connub.
Praecept.

Upon the whole, this seeming Equality of Fortune and Condition in the Conjugal State very well describes to us that Tenor of Administration, which *Aristotle* calls the *Aristocratical* Polity of Man and Wife⁹. Where the common Interest of the Family, and the Duties of Oeconomy lye upon both alike; where the Power was in some measure shared between them; and no disparity, no gradation of Authority understood, but what might fairly arise from the supposed Superiority of the One, upon the consideration of Strength, of Judgment, and Experience.

Ὅσσαι νῦν γε γυναῖκες γὰρ ἀνδράσιν οἶκον ἐχοῦσι.†

Plutarch has touched it finely²:

Ὡς περ ἂν φθόγῳ δύο σύμφωνοι ληθῶσι, τῷ βαρυτέρῳ γίνεται τὸ μέρος, ἔτι πάντα παλαιῶς ἐν οἰκίᾳ σωφρονέσῃ παύσασθαι μὲν ὑπὲρ ἀμφοτέρων ὁμονούντων, ἐπιφαίνεται δὲ τὴν τῷ ἀνδρὸς ἡγεμονίαν, ἣ καὶ προαίρεσιν §.

However, let it be observed, that this Fellowship in Stock and Property, was not the *ordinary* Disposition of Law, unless by express Stipulation it was so provided³. It was a Connivance which the Law submitted to, and, for the Peace and Harmony of Families, rather indulged the Supposition, than confirmed the Right. The Interest, which the Wife had in the common Goods was *Ufus*, non *Abusus*. She had not the Property, but the ordinary Enjoyment.

³ D. 24. 3. 17. 1.
44. 1. 16. ult.

That this Partnership was not *communi Jure*, as I have just now laid down, is plain from hence also, that even the Wife might in some cases have her separate Property, where the Husband could not intermeddle⁴. However, that distinct Interest of the Wife was never favourably looked upon, was contrary to all the Principles of good Policy, and, I hope, I shall not be thought severe, when I add, that it calls to my mind an unlucky Passage in *Plautus*⁵,

⁴ C. 5. 14. 8.

⁵ Casin. II. 2.
25.

Vnde ea tibi est?

Nam peculī probam nihil habere addecet

Clam virum: et quae habet partum, ei haud commodi est,

Quin viro aut subtrahat, aut stupro invenerit.

Hoc viri censeo esse omne, quidquid tuum est.

* Communione Ignis et Aquae.

† Quotquot nunc mulieres sub viris domum regunt.

§ Sicut cum sumuntur duae consensae voces, cantus graviori adscribitur, ita in familia rebus instituta omnes res geruntur quidem consensu Conjugum, viri tamen imperium vel consilium elucet.

(6). CON-

(6). CONTUBERNIVM.

This is the particular Appellation, which the Romans gave to the Conjunction of their Slaves, to whom They did not impart the Rights and Interests, the Idea and Effects of lawful Wedlock: Theirs was *Figura et Imago Matrimonii tantum*⁶.

*Cum Ancillis non potest esse Connubium, nam ex hujusmodi Contubernio Servi nascuntur*⁷.

*Inter Servos et Liberos Matrimonium contrahi non potest, Contubernium potest*⁸.

Quaeso, hercle, quid isthuc est? Serviles Nuptiae?

Servine uxorem ducent, aut poscent sibi?

*Novum attulerunt, quod fit nusquam gentium*⁹.

This Propriety of Language is remarkable in that Passage of Varro¹.

Praefectos alacriores faciundum praemiis, dandaque opera, ut habeant peculium, et conjunctas conservas, e quibus habeant filios.

Hence it was, that there was no Process for Adultery between these *Contubernales*, for there was no Marriage.

*Servi ob violatum Contubernium suum adulterii crimine accusari non possunt*².

The natural Rights however of Blood, Relationship, etc. were preserved to them; and such incestuous Mixtures, for instance, were forbidden them, which were against the Laws of their Being; from the Interests of which nothing could divide them. *Quia Civilis Ratio civilia quidem Jura corrumpere potest, naturalia vero non*³.

And be it remember'd, that *Contubernium* is not tied down to Slaves alone, but is the Expression for all such Conjunctions, as the Law allows not; as Incestuous, etc. Which is plain from the Law cited in my Margin⁴.

II.

We proposed to inquire into the Nature and Essence of Marriage, and those rational Principles, upon which it is founded.

We gather by Reason and Experience, that This is the only Way by which Providence has plan'd the Succession of Mankind; as it has been, not unelegantly, called a kind of Artificial Immortality: *Damnum decedentium reparatione novorum rependere*. And as this is a manifest Design of Providence, it is as manifestly, the Duty of Mankind to conform to it: with what Degree of Obligation, We shall see presently.

Some Systems of Law, and some Schools of Philosophy, as We have had occasion to observe⁵, have joined together in a harsh Doctrine: no less than that of involving the whole Animal World under one Idea or Complexion of Law, called from thence, the Law of Nature. It is true, that Providence has visibly and alike subjected both the Animal and Rational System to the Influence of two very sensible Impressions; the One to maintain and secure the Person of the Individual, and the Other to continue and propagate the Succession of the Species⁶. The last of which lies before us at present.

⁶ Noodt. Tom. II. pag. 487. col. 1. A. Faber, ad Tit. de Nuptiis, pag. 228:

⁷ C. 5. 5. 3. Add. C. 2. 21. 4. 6. 59. 9.

⁸ Paul. Sent. II. 19. 3.

⁹ Plaut. Casin. Prol. 68.

¹ I. de R. R. 17.

² C. 9. 9. 23. Add. D. 48. 5. 6. pr.

³ J. 1. 15. 3. Add. D. 23. 2. 8. l. 14. § 2. cod.

D. 50. 17. 8.

⁴ C. 5. 5. 9.

⁵ Above, pag. 111, seq.

⁶ Above, pag. 122.

Hoc apparet in bestiis, volucris, agrestibus, natantibus, cicuribus, feris; primum, ut se ipsae diligant (id enim pariter cum omni animante nascitur) deinde ut requirant atque appetant ad quas se applicent, ejusdem generis animantes: idque faciant cum desiderio et cum quadam similitudine amoris humani⁵.

⁵ Cic. de Amicit. § 21.

Cum excogitasset Deus duorum sexuum rationem, attribuit ipsis ut se invicem appeterent, et conjunctione gauderent, eaque ratione propagari et multiplicari genera possent⁶.

⁶ Lactant. VI. 23.

Διὰ γὰρ τὸτο καὶ τὰ μάλιστα ὁ πρῶτος καὶ μέγιστος ἐκεῖνος Θεός, ὁ τεκμηριώμενος ἡμᾶς, διχῇ τε διεῖλε τὸ θνητὸν γένος, καὶ τὸ μὲν ἄρρεν αὐτῷ, τὸ δὲ θῆλυ ἀποδείξας, ἔρωτα καὶ ἀνάγκην σφίσι τῆς πρὸς ἀλλήλους συνουσίας ἐπέλαβε, καὶ γόνιμον τὴν ὁμιλίαν αὐτῶν ἐποίησεν, ὅπως ἐκ τῶν αἰεὶ γεννωμένων αἰδίων τρόπον τινὰ καὶ τὸ θνητὸν ἀπεργάσῃται.*

⁷ Dion. Cassius LVI. 2.

But Philosophers, who have examined this Principle with the greatest Attention, have not sat down contented here. For observing that the System we belong to, is not only supported by these Laws of Tradition and Rules of Succession, in the Circumstances of *Man* and *Animal* only, but reflecting that They extend farther than is vulgarly apprehended, have ventured to incorporate into the Alliance of the *Vegetable* World also.

Τὸτο ἔκ ἐκ προαιρέσεως, (are the Words of a very experienced Philosopher⁸) ἀλλ' ὥσπερ καὶ ἐν ποῖς ἄλλοις ΖΩΟΙΣ καὶ ΦΥΤΟΙΣ φυσικὸν τὸ ἐφίεσθαι, οἷον αὐτὸ, τοῖς τὸν καταλιπεῖν ἕτερον.

⁸ Arist. I. Polit. 2.

Which in my Paraphrase runs thus:

“ This is not a Matter of Choice and Indifference. It is the Impression of Providence, and the Rule of Nature, that there should be an *Effort* in the *Vegetable*, the *Animal*, as well as the *Rational* part of the Creation, each in its own Province, and each according to its own method of Activity, to keep up the System and Order of the World, by leaving their Like, their Kind, or Representative, to take their Places after them.”

This is the only Sense, that ἐφίεσθαι can properly admit of here, and it is a fine one, viz. To express the Destination and Impulse of Nature. But be that as it will: As the Plants of the Earth, as well as the Beasts of the Field, are fairly taken into this Account, it was partial in *Vlpian*⁹ to exclude the former from his Consideration of Natural Law, to which they had an Equal Pretence, upon the Principles He set out with; viz. that the Instincts, the Tendencies, and the Suggestions of *Natural Oeconomy*, were so many Principles of *Natural Law*.

My Reader will observe, that under this Principle, which I am now considering, I subjoin, what ought not to be separated, and which

* Quam potissimum ob causam primus iste ac maximus, qui nos condidit, Deus, quum humanum genus in duas secevisset partes, ac masculam unam, alteram muliebrem fecisset, amorem eis ac necessitatem coitus inter se indidit, foecundamque eorum consuetudinem esse voluit, ut ex his, qui ex aliis alii nascerentur, sempiternum quoque aliquo modo genus mortale redderet.

*Vlpian*⁹ has not separated, from it, the natural Duties of Education also. ⁹ Ibid.
The mutual Appetite of the Sexes: and again, the Στοργή, or Parental
Tenderness, the Concern implanted in the Producent to raise his
Offspring into the Rank and Circumstance of Self-Support, is only one
comprehensive Idea of a great Natural Duty, fairly attended to through
every Stage of its Progress.

*Haec inter se congruere non possunt, ut Natura et procreari vellet, et
diligere procreatos non curaret*¹.

¹ Cic. III. de
Fin. 19.

The Circumstance of Education, in the Care of our Production, is
common to Our Nature and the Animal, but extends no farther: our
Connection with Vegetation breaks off here. And when We go one
Step farther, We take leave of the Animal System also. For though in
many Species of the Brute Creation We find a Parental Concern, which,
during the Impotence and Imperfection of their Young, shall in many
instances be able almost to alter the Properties of their Nature, and in-
fuse an amazing Spirit of Courage into the Fearful, the Impotent, and
the Contemptible: yet when the Purposes of Protection are answered,
this Zeal shall be succeeded by a Scene of Indifference and Forgetful-
ness almost as amazing as the other. Those Impressions upon Animal
Life were only the Ministers of Sense, and had their Powers confined
within the means and purposes of Preservation; when That is once
established, they seem to retire and be discharged.

*Amicitia — quod quidem quale sit, etiam in bestiis quibusdam ani-
madverti potest: quae ex se natos ita amant ad quoddam tempus,
et ab eis ita amantur, ut facile earum sensus appareat. Quod in
homine multo est evidentius*².

² Id. de Ami-
cit. § 8. Add.
C. 5. 13. unic.
5. 16. 61. 8.
5.

Nay farther, when Nature and Providence have, as it were, taken the
charge of Education upon themselves, We find this Indifference still
earlier, and the Degrees of Affection for their Young, in several Spe-
cies of Animals, set out a Distinction between one Animal and ano-
ther. Thus the Ostrich, for instance, in the Language of Scripture³, ³ Job
leaveth her Eggs in the Earth, and warmeth them in the Dust: And for- XXXIX.
getteth that the Foot may crush them, or that the wild Beast may break them. ^{14-16.}
She is hardened against her young ones, as though they were not hers.

But in the Human System, Nature is not bounded by the Principles
We were speaking of. For, besides the lasting Endearments of Blood
and Affection, Man is called upon to continue this Vigilance in a vir-
tuous and useful Education.

*Gratum est, quod patriae civem populoque dedisti,
Si facis ut patriae sit idoneus, utilis agris,
Vtilis et bellorum et pacis rebus agendis.
Plurimum enim intererit, quibus artibus, et quibus hunc Tu
Moribus instituas*⁴.

⁴ Juvenal.
XIV. Sat. 70.

Nor is the Temporal Settlement also the lowest Concern with some Parents, or the least considerable Part of their Attention : according to

^e Med. 1098. *Euripides* ⁶,

Οἷσι δὲ τέκνων ἐστὶν ἐν οἴκοις
Γλυκερὸν βλάβημ', ἐσορῶ μελέτη
Καλῶς ἰσχυρομένους τὸν ἅπαντα χρόνον.
Πρῶτον μὲν ὅπως θρέψωσι καλῶς,
Βίον δ' ὁπόθεν λείψωσι τέκνοις *.

It is from these Reflections, or such as these, that Mankind comes to inform himself of the Principles upon which Matrimony is established: that He discovers it to be the golden Chain, which supports the Series and Succession of Nature; which has connected, and still continues to connect, the beginning of Ages, through Ours, with many that may follow hereafter: Χρυσῆς καὶ ἀρήκτε σειρᾶς, ἢν [ἡ Φύσις] ἐνῆράπρεσα αἰεὶ, καὶ ἐνγκολ-
λῶσαι τῷ φθίνοντι τὸ φύομενον, ἐκ ἀπολισθαίνει εἰς τὸ μὴ εἶναι ⁷.†

⁷ Themist.
apud Stob.
Serm.
LXXXI.

*Providit ille maximus Mundi Parens,
Quum tum rapaces cerneret fati manus,
Vt damna semper sobole repararet nova.
Excedat, agedum, rebus humanis Venus,
Quae supplet ac restituit exhaustum genus,
Orbis jacebit squalido turpis situ* ⁸.

⁸ Senec. Hip-
polyt. 466.

*Coelibem vitam probet
Sterilis Juventus : hoc erit, quicquid vides,
Vnius aevi Turba, et in semet ruet* ⁹.

⁹ Id. ibid. 478.

¹ I. 1.

So *Florus* ¹ and *Livy* ² both consider the Founders of Rome, as *Populus unius aetatis*, till they borrowed Wives of their Neighbours.

² I. 9.

*Sic rerum summa novatur
Semper ; et inter se mortales mutua vivunt ;
Augescunt aliae Gentes ; aliae minuuntur,
Inque brevi spatio mutantur secla Animantium :
Et quasi cursiores vitae lampada tradunt* ³.

³ Lucret. II.
74.

Which last Allusion was kept up by *Augustus* in his Address to his

⁴ *Dion Cassius* Subjects for the Encouragement of Matrimony ⁴.
LVI. 2.

Τὸ θνητὸν τῆς φύσεως ἡμῶν αἰδίῳ διαδοχῇ γενῶν, ὥσπερ τινῶν λαμπαδῶν, παραμυθεῖσθαι §.

* *Quibus autem liberorum est in aedibus
Dulcis propago, eos video cura
Maceratos per omne tempus :
Primum quidem, ut bene educent,
Deinde quo pacto rem familiarem liberis relinquunt.*

† *Aurea illa infraeque catena, quam Natura perpetuo contexens, et obeuntibus nascentia conjungens, ne in nihilum relabatur, sibi cavet.*

§ *Mortalitatem naturae convenit perpetua stirpis successionem, quasi faciem aliis subinde aliis per-
rigentibus, compensare.*

In *Sparta*, where the Reverence paid to Seniority was strained to the highest Pitch imaginable, a young Man refusing the common Respect to *Dercyllidas*, who had past through Life without marrying, gave him this reason for it: "Because you have left no one behind you, who shall return the Compliment."

⁵ Plutarch. in Lycurg. pag. 105. Ed. Bly-an.

But indeed many Circumstances may arise, where Individuals may abstain from Marriage without Imputation: As no general Law can oblige, when Time, Opportunity, and other Considerations, are not given to comply with it: As that Text in *Genesis*⁶ is not properly and strictly a Law, but a Benediction: and lastly, As the great Purpose of Providence is not defeated by the Celibacy of one Man, of Ten, or of Twenty, (Though this Argument, often made use of, is scouted by *Augustus* in his Oration upon this Subject).

⁶ I. 28.

However Celibacy is very justly discountenanced, and Human Laws have not only been upon many Occasions very remarkable, but also fairly justified in laying Restraints upon it. And when it is urged against this coercing Power, that *Matrimonia debent esse libera*, it is granted as to the particular Person. Your Consent is not compelled for *Titia* or *Sempronia*. The State has a Right to your Contribution in general, but leaves you to chuse the Party at your own Discretion.

Κλέαρχος ὁ Σολεὺς — ἐν Λακεδαιμόνι, φησὶ, τὰς ἀγάμους αἱ γυναῖκες ἐν ἑορτῇ τινὶ περὶ τὸν βωμὸν ἔλκεσαι ῥαπίζουσιν, ἵνα τὴν ἐκ τῆς πράγματός ὕβριν φεύγοντες φιλοσοργῶσι τε καὶ ἐν ὥρᾳ προσίωσι τοῖς γάμοις.⁷*

⁷ Athen. l. 13. init.

Οὐ μὴν ἀλλὰ καὶ ἀτιμίαν τινὰ προσέθηκε τοῖς ἀγάμοις· εἰργοντο γὰρ ἐν ταῖς γυμνοπαιδαῖς τῆς θείας. Τὰ δὲ χειμῶνος οἱ μὲν ἀρχόντες αὐτὰς ἐκέλευον ἐν κύκλῳ γυμνὰς περιέναι τὴν ἀγορὰν, οἱ δὲ περιόντες ἤδον εἰς αὐτὰς ὡδὴν τινὰ πεποιημένην, ὡς δίκαια πασχοῖεν, ὅτι τοῖς νόμοις ἀπειθεῖσι.⁸†

⁸ Plutarch. in Lycurg. pag. 104.

Again,

Ἦν γὰρ, ὡς ἔοικεν, ἐν Σπάρτῃ καὶ Ἀγαμίε δίκη, καὶ Οψιγαμίε, καὶ Κακογαμίε.⁹§

⁹ Plutarch. Lyfand. extrem.

The last of which, as my Author there explains it, was an Action against those We call Fortune-Hunters, Τὰς ἀντὶ τῶν ἀγαθῶν καὶ οἰκείων τοῖς πλεονεξίοις κηδεύουσας ||.

Σπαρτιατῶν νόμος τάττει ζημίας, τὴν μὲν πρώτην, Ἀγαμίε, τὴν δευτέραν, Οψιγαμίε, τὴν τρίτην καὶ μεγίστην, Κακογαμίε.¹‡

¹ Ex Aristonis Comment. apud Stob. Sermon. LXIV.

* Clearchus Solensis — ait Lacedaemone feminas quodam Festo die coelibes viros circum aram tractos impaetis colaphis caedere, ut indignitatem ejus contumeliae perosi liberos ac prolem tollere cuperent, et tempestive adjungerent sese uxoribus.

† Insuper autem et infamia quodam notabat coelibes, qui nudarum certantium spectaculo arcebantur. Bruma etiam hi, ex Magistratum edicto, cogebantur forum vestibibus spoliati obire; et inter obeundum cantilenam in se compositam concinebant, merito ita puniri se quod non parent legibus.

§ Erant Lacedaemone Coelibatus Actiones, et Serotinarum Nuptiarum, etiam et Malarum.

|| Qui pro bonis et necessariis affinitatem cum opulentis jungebant.

‡ Spartanorum Lex multam statuit, primam Coelibatus, secundam Serotinarum, tertiam Malarum, Nuptiarum.

² De Amore
Prolis init.

There is another Passage much to the same Purpose in *Plutarch*¹, if it was but fairly corrected :

Πρῶτον ἔκ ἀναμένει νόμους Ἀγάμους καὶ Οὐσιγάμους, (Read ΑΓΑΜΙΟΥ and ΟΥΣΙΓΑΜΙΟΥ, They were the names of Civil Actions or Processes, as We see in the two last Instances) καθάπερ οἱ Λυκέρους πολῖται καὶ Σόλωνος ἀτιμίας ἀτέκνων δέδοικεν †.

The Roman Law lent all its Aid to a Point so National and so Interesting :

³ Cic. 6. de
Repub. apud
Priscian. Lib.
XV.

*Firmiter majores nostri stabilita Matrimonia esse voluerunt*¹.

⁴ IX. 22.

So I find in *Dionys. Halic.*⁴ where He is refuting the Fable of the CCCVI Fabii, who fell in the same Action, and left only one Child of the Name,

Οὔτε γὰρ ἀτέκνης τε καὶ ἀγάμους ἀπαύτας εἶναι δυνατόν ἦν τὰς ἐξελθόντας εἰς τὸ φρέριον Φαβίους. Ο γὰρ ἀρχαῖος αὐτῶν νόμος ΓΑΜΕΙΝ τε ἡνάγκαζε ΤΟΤΣ ΕΝ ΗΛΙΚΙΑΙ §.

⁵ T. I. Edit.
Bryan. p. 286.

And it was a Branch of the Censor's Office. So *Plutarch* in his Life of *M. Furius Camillus*⁵,

Μνημονεύεται δὲ αὐτῷ Τιμητῷ ὄντι καλὸν μὲν ἔργον, τὸ τὰς ἀγάμους, λόγοις τε πείθοντα, καὶ ζημίαις ἀπειλῶντα, συγκαταζεύξαι ταῖς χηρευσαῖς γυναῖξι· πολλὰ δ' ἦσαν αὐταὶ διὰ τὰς πολέμους ||.

Where there is no occasion to restrain the Idea to Widows only, as it is generally apprehended and translated. The Words in both Languages mean only *unmarried* or *single Women*.

*Viduam non solum eam, quae aliquando nupta fuisset, sed eam quoque mulierem, quae virum non habuisset, appellari ait Labeo*⁶.

⁶ D. 50. 16.
242. 3.

So in that Passage of *Juvenal*⁷:

Delicias Viduae tantum aspernatur adulter.

⁸ Id. VI. Sat.
141.

—— *Vidua est, locuples quae nupsit avaro*⁸.

⁹ Isidor. IX.
Orig. 8.

*Item Vidua dicta, quod sola sit, nec circa consortium alterius viri conjugalia jura custodiat*⁹.

And in many more :

*An te morantur Virgines Viduae domi*¹ ?

¹ Senec. A-
gam. v. 193.

*Psyche Virgo Vidua domi residens*².

² Apul. IV.
Met. Add.
Price ad Apo-
log. pag. 86.

There is a remarkable Period in the Preface of *Cornelius Nepos*,

Nulla Lacedaemoni tam est nobilis Vidua, quae non ad scenam eat mercede conducta.

† Primum non expectant dum Leges contra coelibatum aut serius matrimonium ineuntes ferantur, ut Lycurgi et Solonis Cives, neque metuant ignominias prole carentibus propositas.

§ Nec enim fieri poterat, ut omnes Fabii qui in illud castellum iverant, essent sine liberis et coelibes. Nam prisca eorum Lex cogebat eos qui per aetatem possent, uxores ducere.

|| Hujus recensetur unum in Censura eximium factum, quod coelibes partim blande appellande, p. et in denuncianda multa, viduis, quae ob bella erant multae, matrimonio copulaverit.

Van Staveren, who published this Author, in his defence of his Edition³ against *J. Mich. Heusinger* imagines this Passage to be the Translation of some Greek Writer — *apud Graecos autem*, says He, *vox χῆρος latissimae est significationis*⁴. From what I have observed of the use of *Vidua*, He had no occasion to have recourse to the Greek. The Latinity here is justifiable enough. But this is not the Sore of that Passage.

³ Miscell. Ob-
serv. Nov.
Tom. VI.
pag. 513.
⁴ Ibid. pag.
519.

To proceed. It is possibly of the same Censorship, viz. of *Camillus*, that *Valerius Maximus* thus writes,

*Camillus et Posthumius Censores, aera poenae nomine eos qui ad senectutem coelibes pervenerant, in aerarium deferre jusserunt; iterum puniri dignos, si quo modo de tam justa constitutione queri essent ausi: cum in hunc modum increparentur. "Natura vobis, quem-
" admodum nascendi, ita gignendi legem scribit; parentesque vos
" alendo, nepotum nutriendorum debito, si quis est pudor, alligave-
" runt. Accedit his, quod etiam Fortuna longam praestandi hu-
" jusce muneris vacationem estis affecuti: cum interim consumpti
" sint anni vestri, et mariti et patris nomine vacui. Ite igitur,
" et nodosam exsolvite stipem, utilem posteritati numerosae*⁵.

⁵ IX. 2.

In the Year of the City 622, when these Laws seem to have gone into disuse, *Metellus* the Censor was at the Head of a Motion *de Prole augenda*, or perhaps rather published a Decree, in virtue of his Office, to enforce the Laws in being.

*2. Metellus Censor censuit, ut omnes cogerentur ducere uxores liberorum creandorum causa. Exstat Oratio ejus, quam Augustus Caesar, quum de maritandis ordinibus ageret, velut in haec tempora scriptam in Senatu recitavit*⁶.

⁶ Epit. Liv.
Lib. 59.
Sueton. Aug.
c. 89.
⁷ I. 6.

There is some Account of this Oration in *A. Gellius*⁷, who however seems to confound two *Metelli*, *Metellus Macedonicus*, and *Numidicus*. It was the Former, of whom the Epitome of *Livy* speaks, and *Gellius* gives this Business to the Other.

Some time after this, *Julius*, who had taken upon him the Censorship, under the Title of *Praefectura Morum*, observing a Decrease of the Inhabitants, gave a new Edge to the Laws, that had been made in favour of Posterity⁸. That He introduced a new Law concerning it, which some are apt to conclude from a Passage in *A. Gellius*⁹, I very much doubt. The *Leges Juliae*, most of them, belong to *Augustus*, and it is certain that He enacted upon this Head in particular, in a very remarkable and well-known Law.

⁸ Dion Cassius
XLIII. 25.
⁹ II. 15.

His Merits and his Care *de maritandis Ordinibus* have been greatly cried up. Of his Services herein, and the *Lex Julia*, consult the Authors in my Margin, besides those who treat *de Legibus et Sctis*¹.

¹ Sueton. c. 34.
Hor. Carm.
Saec. v. 19.
Dion Cassius
LIV. 16.
Tacit. III. An-
nal. 25.

The Law, it seems, which *Augustus* proposed and past, was felt but ill by the Country. Accordingly, *A. 762*, He harangued them in a very masterly

¹ Torrent. et
Heinecc. ad
L. Jul. et Pap.
Poppaeam.

²Dion Cassius
l. 56. init.

masterly manner upon that occasion. The Speech is yet extant², and has been often said to be that of *Metellus* before-mentioned. But That was held *ad Senatum*, namely, upon the Proposal, before it past into a Decree, or a Law: This in *Dion*, *ad Equites*, who solicited a Repeal. But let the Author be *Metellus* or *Augustus*, it is as fine a Remain as any in Antiquity.

³LV. 2. See
the Notes up-
on the Place.

My Reader must not imagine, that this Scheme for maintaining a sufficient Number of Subjects was supported only by the Penalties and Discouragements, which were thrown upon Celibacy. The *IVS TRIVM LIBERORVM*, which conveyed Honors, Precedencies, Discharges, and many other Emoluments upon a Father so distinguished, is an Instance of what I am saying. Something of this in *Dion Cassius*³.

This Measure was good, but not of Roman Original. The *Jus III. Liberorum* was fairly copied from the Lacedaemonians, who contributed much to the Roman System, as We have inculcated at the beginning of these Papers. (Which I am still inclined to believe, though *St. Austin*, if I remember right, is of another mind).

Βελλόμενος ὁ νομοθέτης ὡς πλείους εἶναι τὰς Σπαρτιατάς, προάγεται τὰς πολιτάς ὅτι πλείους ποιεῖται παῖδας. ἐς γὰρ αὐτοῖς νόμος, τὸν μὲν γεννῆσαν τρεῖς υἱὲς ἀφαιρεῖν εἶναι, τὸν δὲ τέτταρας, ἀτελῆ πάντων⁴.*

⁴ Aristot. II.
Polit. 7.
Add. Aelian.
VI. V. H. 6.

This is a short Sketch of the Reproofs which the Romans gave to Celibacy down to *Augustus*. But this Spirit was visible in many Instances besides. It was the Sense of the Roman Law, *ne quod omnino Nuptiis Impedimentum inferretur*⁵. And therefore it was a Rule among them, that the *Lex Julia et Papia Poppaea*, which was so much in the Interest of Matrimony, should be supported by the most favourable Interpretations, *et ipso Jure rescindi, quod fraudandae Legis gratia esset adscriptum. Legem enim utilem Reip., sobolis scil. procreandae causa latam, adjuvandam Interpretatione*⁶. And again, such abominable Conditions in last Wills and Testaments as enjoined a single Life, were looked upon as derogatory of this great and fundamental Principle of State, *et pro non adjectis habebantur*. The Devise was good, though the Conditions were not complied with.

⁶l. 64. § 1.
l. 79. § 4. cod.

But afterwards when Celibacy and Vows of Virginity came into Fashion, the Christian Emperors drew off by their Constitutions these Penalties; and the single life became more popular than was consistent with good Politics. See the Title in the Theodosian and Justinianean Codes, *DE INFIRMANDIS POENIS COELIBATVS ET ORBITATIS*.

And this leads me to speak a Word or two to Widowhood, and the Conceptions of the Ancients in regard to *Nuptiae Secundae*.

Though the Increase of Mankind is something interested in them, yet it must be confessed, that these *Iterata Vota* have been looked upon but

* *Volens Lycurgus quamplurimos esse Spartanos, excitat cives, ut quamplurimos liberos tollerent. Est enim apud eos Lex, ut si quis gigneret tres filios, immunis esset ab excubiis, qui quatuor, ab omni munere.*

with an evil Eye by most Countries and Constitutions. The Ecclesiastical Writers gave them very hard Names, which I do not care to repeat. But that was natural, and what was to be expected. For if, according to their Notions, there was so great an Odour of Sanctity in a single Life, they could not but entertain a very bad Impression of those, who renounced that Condition a *second* time.

Rigaltius, in his Preface to *Tertullian*, has in some measure accounted for these Aversions which prevailed in the early Ages of Christianity. *Nuptias secundas accusat [Tertullianus] ac ne unas quidem probare videtur. Certe Apostolo contradicit. Sed disciplinae res erat; et temporum collectionem, consummationemque seculorum instare credebat. Christiani vexabantur; et volebat esse ad martyria paratissimos, absque ullis aut Conjugum aut Liberorum impedimentis. Ita ratio temporis excusat, quod alias minime ferendum fuisset.*

But (I do not know how) Antiquity held up this Notion very high, and laid the fair Sex particularly under a kind of fashionable Restraint, by lavishing their Compliments upon those who maintained the Honours of Widowhood.

*Ille meos primus, qui me sibi junxit, amores
Abstulit: ille habeat solus, servetque sepulchro⁷.*

⁷ Virg. IV.
Aen. 27.

*Jungor, Paule, tuo sic discessura cubili.
In lapide hoc uni nupta fuisse legar⁸.*

⁸ Propert. IV.
12. 35.

*Filia, Tu specimen Censurae nata Paternae,
Fac teneas unum, nos imitata, virum⁹.*

⁹ Id. ibid. 127.

Vnico gaudens Mulier marito¹.

¹ Hor. 1. Od.
XIV. 5.

ΚΑΡΠΟΣ ΤΑΝ
ΙΔΙΑΝ ΓΥΝΑΙΚΑ
ΣΩΕΙΔΑ ΑΦΗΡΟΙΣΕΝ
ΤΗΝ ΜΟΝΑΝΔΡΟΝ².*

² Spon. Mi-
scell. Erud.
Antiq. p. 342.

*Fabretti*³ has this Inscription of *Spon*, and gives it ΑΦΗΡΟΙΣΕΝ. Neither of them accurately. The true Reading is discoverable by another Inscription in *Gorius*⁴,

³ pag. 324.
⁴ Antiqq.
Flor. pag. 99

ΑΛΕΞΙΩΝ ΚΑΙ ΕΠΙΤΕΤΕΑΣΑ
ΖΩΣΙΜΟΝ ΤΟΝ ΤΙΟΝ
ΑΦΗΡΩΙΣΑΝ.

Αφῆρῶσαν *Tumularunt*, from *Ἡρώων Sepulchrum*. The Lexicons have it not. See *Hagenbuchius*⁵. *Reinesius*⁶ observes, that *Ἡρώων* in this Sense, is of the lower Greek. Which seems to me a very strange Assertion.

⁵ Epist. Epigr.
pag. (53) (54).
⁶ Ad Inscript.
VII. 28.

* *Carpus*
Suam Vxo'em
Socida consecravir
Vniviram.

HIC

MARRIAGE.

HIC SITA EST ARRIA
M. F. MAXIMILLA
VNIBYRIA⁷ QVE VIXIT
IN CONNVBIO MARCO
AVRELIO AVGG. LIB.
FELICI AN. XIIX. M. VIII.
D. VI. CASTEQ. IN HIS
ANNIS NVNQVAM MARI
TO SVO MALEDIXIT⁸.

RENATVS
VOLVSIAE IVSTAE
MATRI CARISSIMAE
OMNIVM FEMINAR.
SANCTIORI VNIVIRAE⁹.

⁷ i. e. VNIVI-
RA.

⁸ Fabrett. In-
script. p. 324.

⁹ Gruter
DCCXLVIII.
4.

Brevis Altercatio inde ex iracundia muliebri in contentionem animorum exarsit, quum se Virginia et patriciam et pudicam in Patriciae Pudicitiae templum ingressam, et uni nuptam, ad quem virgo deducta sit.—Eodem ferme ritu et haec Ara, quo illa antiquior, culta est; ut nulla, nisi spectatae pudicitiae matrona, et quae uni viro nupta fuisset, jus sacrificandi haberet¹.

¹ Liv. X. 23.

When the Romans, in honour of the Mother and Wife of Coriolanus, erected the Temple of FORTVNA MVLIEBRIS,

Γυναῖκες ἐν ἑβείῃ κατέσκησαντο — τῷ ἑοάνῳ τέτῳ μήτε σεφάνες ἐπιτίθεναι, μήτε χεῖρας προσφέρειν γυναῖκας, ὅσαι δευτέρων ἐπειράθησαν γάμων².*

² Dionys. Ha-
lic. VIII. 56.
Add Serv. ad
Virg. IV. Aen.
19. Festus v.
PUDICITIAE,
etc.

³ Ad L. Jul.
etc. Lib. II.
Cap. 16.

⁴ Tacit. de
Morib. Germ.
c. 19.

And these were the Sentiments of other People also, as you may learn from Heineccius³.

Melius quidem adhuc eae Civitates, in quibus tantum Virgines nubunt, et cum spe votoque uxoris semel transigitur. Sic unum accipiunt maritum, quomodo unum corpus, unamque vitam, ne ulla cogitatio ultra, ne longior cupiditas, ne tanquam maritum, sed tanquam matrimonium ament⁴.

How this stood in the lower Ages, We have just mentioned, and Tertullian in his *Exhortatio ad Castitatem*, and in his *Traet de Monogamia*, will inform you farther: How it stood in the Law, may be seen⁵ from the Title in the Code DE SECUNDIS NVPTIIS⁵.

However Augustus saw better the Interest of his People, and through the Encouragement He gave to Matrimony, condemned all such Clauses, as tyed down the Relict to a Rule of Widowhood⁶. And by a *SCtum*, that passed some Years after that Emperor, it was enacted, That if the Widow should make Oath within the Year, *se liberorum quaerendorum causa ad secundas nuptias transire*, the Condition in her Husband's Will, enjoining perpetual Widowhood, should pass for nothing. But this was afterwards abrogated by Justinian⁷.

⁷ C. 6. 40. 2.
Nov. 22. c. 43.

* Mulieres morem constituerunt, ut neque coronas huic simulachro imponerent, neque manus ei admovent mulieres secundas nuptias expertae.

The

The Year of Widowhood (not to pass over that Consideration) for a long time was the Space of Ten Months only, according to *Romulus' Style* :

*Tempora digereret cum Conditor Urbis, in anno
Constituit menses quinque bis esse suo.*

*Per totidem menses a funere Conjugis Vxor
Sustinet in vidua tristitia signa domo⁸.*

So *Plutarch*⁹.

Αλλὰ τῷ μακροτάτῳ πένθεος χρόνον εἶναι δεκαμηνιαῖον, ἐφ' ὅσον καὶ χηρεύουσιν αἱ τῶν ἀποθανόντων γυναῖκες.*

The Words of *Plutarch* mean, that no Widow was allowed *convolare ad secundas nuptias* (for that is the Phrase of the Country) during the first Year, under Pain of Infamy, and other Incapacities¹. Both because there was an Honour or a Decency due to the Memory of the First Husband : and also to prevent the Confusion of Offspring, that so hasty a Conclusion might occasion, *propter turbationem sanguinis*, according to the Words of *Vlpian*².

For which reason a Dispensation was necessary for Widows within the Year (or Ten Months). This was either sued from the Senate : As when *Antony* married *Octavia*, the Widow of *Marcellus*, ἐκ ἑωῆτος μὲν νόμου πρὸ δέκα μηνῶν ἀνδρὸς τελευτήσαντος γαμεῖσθαι, τῆς δὲ συγκλήτης δόγματι τὸν χρόνον ἐκείνη ἀνείσης³ : † or the Emperor : *Solet a Principe impetrari, ut intra legitimum tempus mulieri nubere liceat*⁴.

Why the Period of Ten Months was continued so long, and did not alter with the Roman Year (for although *Numa* enlarged That to Twelve Months, this Computation was not followed in the case before us, till the Age of *Theodosius*) was doubtless *propter partum decimestrem* ;

*Quod satis est, utero matris dum prodeat Infans,
Hoc Anno statuit temporis esse satis*⁵.

To my Reflections upon Celibacy let me subjoin a Word or two upon a Disposition of the Roman Law, that claims to be remembered upon this Occasion. The Romans, in the Article of Matrimony, went one step farther than most other States, and not only held out Encouragements to those who should stock the City with the greatest number of Inhabitants, but, what is very extraordinary, set a Mark upon those Married Men who contributed none. The *Poenae Orbitatis et Sterilitatis* are among the Wonders of ancient Law : and the Words of *Aeschines*, which were produced above upon another Occasion, may fairly be applied here :

Θαυμάσειεν ἂν τις, εἰ εἰσι φύσεως γραφαί.⁶ §

* *Longissimum luctus tempus esse decem mensium, in quibus viduitatem profitentur defunctorum uxores.*

† *Quia vero vetabat Lex ne qua Mulier nisi exactis a morte viri decem mensibus nuberet, tempus est ei Scto remissum.*

§ *Mirum alicui videri queat, aliquas esse in Naturam Actiones.*

⁸ Ovid. I. Fast. 27.

⁹ in Numa. Add. Senec. Consol. ad Helv. C. 16. et Epist. 65.

¹ See C. 5. 9. 1. and 2.

² D. 3. 2. 11. 1. C. 1. 3. 53. 3. 5. 9. 2. and Gothofred.

³ Plutarch. in Anton. pag. 96. Edit. Bryan.

⁴ D. 3. 2. 10. pr.

⁵ Ovid. I. Fast. 33.

⁶ c. Ctesiph. T. II. Edit. Cant. p. 432.

But certain it is, that not only the *Solitarius*, or the Father of one Child was less considered than the Person who had more : but moreover the Childless was actually fined, inasmuch as He was intitled by Law, to half the Legacy only, that was left him by Will : For the other Moiety escheated [CADUCVM]⁶. This was introduced by the Julian Law. So the Scholiast upon *Juvenal*⁷, *Lex Julia jubet eos hereditatem capere, qui filios habent.* Which Language is well understood to exclude those, *qui non habent.*

⁶ Alciat. III.
Dispunct. 3.
⁷ VI. Sat. 38.

⁸ Sozom. I.
Hist. Eccl. 9.

Νόμος ἦν τὸς ἄπαιδας ζημιῶν τὸ ἥμισυ τῶν καθ'αλελειμμένων⁸. *

Plutarch speaking of Instinct, and the Natural Law of Animals, writes thus, at least should write thus, if his Copyists would give him leave : Οὐδ' ἀτιμίας ἀτέκνων δέδοικεν, εἰδὲ τιμὰς διώκει τριπαιδίας, εἰδ', ὡς Ρωμαίων πολ-
λοὶ, γαμῶσι καὶ γεννῶσι, εἴχ' ἵνα κληρονόμους ἔχωσιν, ἀλλ' ἵνα κληρονομεῖν δύνων-
ται⁹. §

⁹ De Amore
Prolis.

¹⁰ IX. Sat. 86.

And this in some measure explains the Passage in *Juvenal*,

*Jam Pater es, dedimus quod famae opponere possis :
Jura Parentis habes : propter me scriberis heres,
Legatum omne capis, nec non et dulce caducum.
Commoda praeterea jungentur multa caducis,
Si numerum, si tres implevero - - -*

But as the Want of Children was a natural Defect, and rather a Misfortune than a Fault, that Fiction of Law, viz. the Grant of the *Jus III. Liberorum*, was not unreasonable, which empowered the Senate, and afterwards the Emperors, to grant the Rights, the Consequences and Effects, at least the Impunity, where Nature had denied the Means and the Ability.

*Quod Fortuna negat fieri, permitte videri :
Natorum Genitor credar ut esse Trium².*

² Martial. II.
91. 5.

Ἡδὲ δὴ Λιβία εἰκόνων τε ἐπὶ παραμυθία ἔτυχε, καὶ ἐς τὰς μητέρας τὰς τρεῖς τεκέσας ἐσεγράφη. Οἷς γὰρ ἂν τὸ ΔΑΙΜΟΝΙΟΝ, εἴτ' ἐν ἀνδρῶν εἴτε γυναικῶν, μὴ δῶ τοσαυτάκις τεκνῶσαι, τέτων τιςὶν ὁ νόμος, πρότερον μὲν διὰ τῆς βελῆς, νῦν δὲ διὰ τῆς αὐτοκράτορος, τὰ τῶν γεγεννηκότων δικαιομαθία χαρίζεται. ὥς ἐ σφῶς μήτε τοῖς τῆς ΑΠΑΙΔΙΑΣ ΕΠΙΤΙΜΙΟΙΣ ἐνέχεσθαι, καὶ τὰ τῆς πολυπαιδίας ἄθλα καρπεῖσθαι³. †

³ Dion Cassius
LV. 2.

* *Lex erat quae orbos non nisi dimidiam partem eorum quae testamento legabantur capere permittit.*

§ *Neque improlium multas metuunt, neque III. liberorum honores persequuntur, neque, ut Romanorum multi, matrimonium ineunt, et prolem producunt, non ut heredes habeant, sed ut hereditatem capere possint.*

† *Livia autem solatii causa statuis donata, et in matrum, quae ter peperissent, numerum relata est. Quibus enim seu viris seu mulieribus Fortuna tot liberorum negasset proventum, eorum nonnullis tamen Lex, antea quidem per Senatum, nunc autem per Imperatorem, Jus III. Liberorum largitur : ut neque multa ea, quae prole destitutis est proposita, teneantur, et copiosae proli constituta praemia adipiscantur.*

Thus

Thus have We gone through the Foundation of Matrimony, viz. *the Succession of Mankind*, and examined the Civil Purposes it was meant for. And were it to rest upon this Principle alone, there would be no Colour left for, what We sometimes meet with, the Marriage of the Old and the Impotent; where according to all natural means and appearances, it is improbable this End should be attained. This is a Conjunction which in all wise Communities is rather tolerated than encouraged. For, as *Quintilian*, or whoever wrote those Declamations, expresses it:

Quaedam et Nubendi Impudicitia est ⁴.

⁴ Declam.
CCCVI.

Satin' sanus es?

Ego novus maritus anno demum quinto et sexagesimo

Fiam, atque anum decrepitam ducam? Idne estis auctores mihi?

⁵ Ter. Adelph.
V. 8. 15.

As the *Anni nubiles* with the Romans ran from Twelve in the Female Sex, and Fourteen in the Male⁶ (not because that was the precise and determinate time of Nature, or fitted all Constitutions alike, but from the genius of positive Law, which must speak a general Language) so here again, upon much the same Principles, They concluded the Powers of Nature must be stinted somewhere, and *presumed* that Period at Sixty in the Male Sex, and at Fifty in the other⁷.

⁶ Nov. Leon.
74.

How the Law stood in regard to these *Sexagenarii Quinquagenariae*-que; what was enacted under *Tiberius*, and what under *Claudius*; what were the Effects of the *SCtum Pernicianum* (or *Persicianum*) and *Calvisianum*, has been examined so minutely by *Heineccius*⁸, that nothing can be added, and so exactly, that nothing can be amended.

⁷ D. 1. 7. 15. 2.
C. 6. 58. 12.
D. 19. 1. 21.
pr.

⁸ ad L. Jul. et
Pap. Popp.

It is to be observed, that these Laws affected not only the Inter-marriages of the Superannuated, the One with the Other, but discountenanced moreover what were called emphatically *Impares Nuptiae*, where one Party alone in the Contemplation of Law would be likely, through an Incapacity of Age, to defeat the primary Design of this Institution.

Οὐ δοτέον, εἰδὲ περιπλέον αἰῶρος καὶ ἀχαρίτης ἐπιπλοκαῖς, καὶ μηδὲν ἔργον
γαμήλιον ἐχέσας, μηδὲ τέλος. Ἀλλὰ γέροντι νέαν ἀγομένῳ φαίη τις ἂν
ἐμμελὲς ἀρχῶν ἢ νομοθέτης τὸ πρὸς τὸν Φιλοκλήτην,

Εὖ γ' ἔν ὡς γαμεῖν ἔχεις τάλας·

Καὶ νέον ἐν δωματίῳ πλυσίας πρεσβυτίδος — ἐξανευρών, μετοικίσει
πρὸς παρθένον νύμφην ἀνδρὸς δεομένην⁹.*

⁹ Plutarch. in
Solone pag.
196. Edit.
Bryan.

* Non tolerandae incongruae et ingratae Conjunctiones, quae nullum habent opus nec finem nuptialem; verum seni juvenculam ducenti Magistratus vel Legislator illud ad Philocletem dictum objiciat,

Quam aptus es ad nuptias, miser!

Quod si Juvenem repererit in anus cubiculo pecuniosae — traducet eum ad virginem quae virum requirat.

But as mutual Society, and the Purposes of a domestick Friendship, may have a secondary Consideration in these Alliances, it is not without reason, that the Severity of some of the earlier Constitutions met with large Abatements under the Regulations of *Justinian*¹. Who, favourable as He was to these unseasonable Contracts, yet seems however to have with-held this Grace from *Widows*, when He took off the Restraint of the *Lex Julia Miscella*, and the Odium and Incapacities attending upon Second Marriage :

¹ C. 5. 4. 27.
6. 58. 12.

- - *Licere Mulieribus etiam maritorum suorum interminatione sprete, quae viduitatem eis indicit, et non dato sacramento, procreandae solis gratia tantum ad secundas migrare nuptias*².

² C. 6. 40. 2.

I am not sure, that this was not the current and received Law of that Country before. There is something that supports my Opinion in a Case, that follows :

*Septicia, Mater Trachalorum Ariminensium filiis irata, in contumeliam eorum, cum jam parere non posset, Publicio Seni admodum nupsit, testamento etiam utrumque praeteriit. A quibus aditus Divus Augustus, et nuptias mulieris, et suprema judicia improbavit. Nam hereditatem maternam filios habere jussit; dotem, quia non creandorum liberorum causa conjugium intercesserat, virum retinere vetuit. Si ipsa Aequitas hac de re cognosceret, possetne justius aut gravius pronunciare? Spernis, quos genuisti: nubis effaeta; testamenti ordinem violento animo confundis: neque erubescis ei totum patrimonium addicere, cujus pollincto jam corpori marcidam senectutem tuam substravisti*³.

³ Valer. Maxim. VII. 7. 4.

This Sentence of the Emperor has been observed by some to be rather a Decision according to the Rules of Equity, than of strict Law. The Statutes of this Country had not (they imagine) provided the Penalty, which *Augustus* here inflicted, for Women that married, when they were past Child-bearing. The Disinheritance of her Children was what moved the Judge, *ut legitimam poenam supergrederetur*⁴, and to leave behind him, in this remarkable Judgment, a strong Instance (if it be an Instance) of that Equitable Severity which I was speaking to in the Place last cited.

⁴ See Sueton. quoted above, pag. 97.

III.

In considering how Marriage is contracted, We shall be conducted into a Reflection upon many useful Particulars: as *Consent*, *Consanguinity*, etc.

There is nothing in the whole Consideration of Matrimony which the Roman Lawyers have inculcated with half the Vehemence, as this single Position, *viz.* that the very Essence and Foundation of it consists in CONSENT alone. I shall examine what they understood by it, and then see

how far this Principle extends, and what are its Operations in forming the Contract before us.

*Nuptias non Concubitus, sed Consensus facit*⁵.

⁵ D. 50. 17. 30.

The Decency and Dignity of the Human Species seems to plead for resting it here. The grosser Considerations of it are left to those Natures which have nothing else for it: where Sense has all the Direction, and Reason none. For when We come to consider this Alliance in the Rational System, much Attention is due to these Maxims of Law:

35. 1. 15.

24. 1. 32. 13.

*In contrahendis Matrimoniis Naturale Jus et Pudor inspiciendus est*⁶. ⁶ D. 23. 2. 14.

*Semper in Conjunctionibus non solum quid liceat considerandum est, sed et quid honestum sit*⁷.

⁷ l. 42. pr. cod.

Add to this, that there is an Union of Hearts and Affections, *Διάθεσις ἀμοιβαία*,* as the Emperor calls it⁸, which must now be taken into the account; a *Perpetua Vitae Consuetudo*, not deriving its happiness from the intemperate Sallies of Blood and Instinct, but the cool and dispassionate Sentiments of Reason and Philosophy. For, as *Quintilian* says⁹,

⁹ Declam. CCLXXIX.

Non satis est Maritum tantum osculo putari.

I have lately touched upon the unsolemn Marriages of the Romans, in which Consent was all the Ceremony: I shall speak to that Point here more fully, as the proper place for its Consideration.

Marriage ranks under those Contracts, *qui consensu solo perficiuntur*: whereas others are more circumstantial, and are compleated either *RE* or *VERBIS*. It is the Nature and Condition of *Consensual* Contracts, that They require no Ceremony or Celebrity to make them valid beyond the Consent once obtained: and if the Cautious or the Formal should for the sake of Security, or Notoriety, *ad praesentem rei gerendae solennitatem vel futuram gestae memoriam*, add the Essentials of other Contracts, their Property is not hereby altered: they remain Consensual Contracts still; as a Nuncupative Will is not the less so, for being reduced into Writing. The Words of *Gaius*, as they are twice produced by *Tribonian*¹, run thus:

¹ D. 20. 1. 4.
22. 4. 4.

Et ideo et sine scriptura si convenit, ut Hypotheca sit, et probari poterit, res obligata erit, de qua conveniunt. Fiunt enim de his scripturae, ut quod actum est, per eas facilius probari poterit, et sine his autem valet, quod actum est, si habeat probationem. Sicut et Nuptiae sunt, licet testationes in scriptis habitae non sunt.

It was in consequence of this, that the Roman Marriages were chiefly contracted by the mutual Consent of Parties, and by the same Consent were disunited. It was like taking for tryal, or being upon liking. And

* *Affectus alternus.*

though,

though, in conformity to those who have gone before me, I reckoned among the *Solemn* Marriages, that which was contracted, as they call it, *ex Vsu*; I am much mistaken, if that was not rather of this *Unsolemn* sort, which was founded upon Consent alone, and became ratified by a Year of Probation, which should pass over without Interruption or Usurpation. And if so, the Weddings of some of our rude Fore-fathers, which are known by the Name of *HOLD-FASTS*, have a Precedent, that those Contractors were possibly but little acquainted with.

As these Marriages were divested of all outward Ceremony, so were they of all *Tabulae Nuptiales*, or Marriages Articles. I call them by this Name; though properly with Us, such mean Deeds of Settlement; with the Romans perhaps they mean no more than an Act, an Entry, or Attestation of the Contract.

Donationes in Concubinam collatas non posse revocari convenit, nec si Matrimonium inter eosdem postea fuerit contractum, ad irritum recidere, quod ante jure valuit. An autem maritalis honor et affectio pridem praecefferit, personis comparatis, vitae conjunctione considerata perpendendum esse respondi: neque enim Tabulas facere Matrimonium⁷.

⁷D. 39. 5. 31.
pr.

Si vicinis vel aliis scientibus, uxorem liberorum procreandorum causa domi habuisti, et ex eo matrimonio filia suscepta est; quamvis neque nuptiales tabulae, neque ad natam filiam pertinentes, factae sunt, non ideo minus veritas matrimonii, aut susceptae filiae, suam habet potestatem⁸.

⁸C. 5. 4. 9.

Neque sine nuptiis instrumenta facta ad probationem matrimonii sunt idonea, diversum veritate continente: neque non interpositis instrumentis, jure contractum matrimonium irritum est: cum omissa quoque scriptura, cetera nuptiarum indicia non sint irrita⁹.

⁹C. 5. 4. 13.

Si donationum ante nuptias, vel dotis instrumenta defuerint, pompa etiam, aliaque nuptiarum celebritas omittatur; nullus existimet ob id deesse recte alias inito matrimonio firmitatem, vel ex eo natis liberis jura posse legitimorum auferri: inter pares honestate personas nulla lege impediende consortium, quod ipsorum consensu, atque amicorum fide confirmatur¹.

¹C. 5. 4. 22.

Nihil obstat, quo minus justum Matrimonium sit mente coeuntium; etiamsi tabulae signatae non fuerint. Nihil enim proderit signasse tabulas, si mentem matrimonii non fuisse constabit².

²Quintilian
V. 11.

It may be proper here to make an Observation or two.

³pag. 277.

1. With what propriety then is it said, and by me lately³, that *Domi-ductio* was the Perfection of the Contract, the Consummation, and what gave the Distinction between *Sponsa* and *Vxor*, if this was compleated before by the Consent of the Parties? Be it remembered, that the Romans had their *Sponsalia* or Precontracts: the Rules of which

which were set out by the Law, and supported by the Practice, of that Country. The *Consensus Sponsalitiis* therefore was one thing; and the *Consensus Matrimonialis* another. And as Spousals might be contracted under Age, and before Puberty⁴; as they are called, not improperly, *Spes futuri Matrimonii*, the Parties at legal Age were at liberty to ratify the former Contract, or not. *Domi-ductio* therefore was that Ratification, stood in the place of the *Consensus Matrimonialis*, and signified a Concurrence which had no occasion to be repeated. The Law of the Country spoke the Language and Practice of the Country; and the imperfect Consent of the Betrothed was perfected by the visible Sign of the same Parties, when they had it in their Power to compleat it.

2. It is not to be understood, as if Consent with all the Powers We have given it, was above Law, and was the only thing to be regarded. When it is said *Consensum facere Nuptias*, it must be such a Consent, as carries Reason and Law along with it. The Consent of the Incestuous, and the Consent of the Precontracted to others, in Places where that Precontract is a Bar, is no Consent at all. For *id quod non factum est jure, pro infecto habetur*. It is with the utmost Propriety that Acts should go for nothing which are not done by warranty of Law, and even those which are transacted before a Judge, who has no competent Jurisdiction.

*Si per errorem alius pro alio Praetor fuerit aditus, nihil valebit quod actum est*⁵——

⁵ D. 2. 1. 15.

And this leads me to consider what kind of Consent That is, and how far it avails to the real purposes of Matrimony, which is obtained by erroneous Suggestions.

*Nuptiae consistere non possunt, nisi consentiant omnes, id est, qui coeunt*⁶——

⁶ D. 23. 2. 2.

Now nothing can be so certain, as that People, who are mistaken, can with no Propriety be said to *consent*. For Consent supposes the Will of the Contracting Parties, and Error supposes nothing at all about it. So that the Maxim is very just and satisfactory, which acquaints us,

*Non videntur, qui errant, consentire*⁷.

⁷ D. 50. 17. 116. 2.

And, to continue the Words of a Law lately cited,

— *Nec enim ferendus est, qui dicat consensisse eos in Praesidem, cum, ut Julianus scribit, non consentiant, qui errent. Quid enim tam contrarium consensui est, quam error, qui imperitiam detegit*⁸?

⁸ D. 2. 1. 15.

To bring this matter home to Matrimonial Consent: If I contract with a Man for his Daughter *Rachel*, and He passes upon me his Daughter *Leah*, it is not a good Marriage. Just as in Bargain and Sale; if I the Purchaser mean the *Fundus Cornelianus*, or the Slave *Stichus*, and You, the Seller, all the while understand the *Sempronian Estate*, or the Slave *Pamphilus*, there is no Contract, *quia in Corpore dissentimus*.

On

On the other hand, it would be of fatal Consequence, if Insinuations of Error were to be admitted in their utmost Latitude, and a Contract to be disturbed, because I was *mistaken*, or even imposed upon in the Age, the Temper, or the Fortune of the Woman I married. Put the case, says *Vlpian*⁹ that I contract for Wine, and the Wine that is delivered me should be sour, I may have reason to repent of my Bargain, but I have no right to dissolve it.

These Considerations have induced the Writers upon this Subject to distinguish in this Contract, as in all others, between Errors *de Substantia*, and Errors *de Qualitate*.

To pursue the last Allusion. An Error in the Quality, *i. e.* the Goodness, the Richness, or the Flavor of my Purchase will not defeat the Stipulation. But, as *Vlpian* there adds, *Si vinum non acuit, sed ab initio acetum fuit*, If the Wine did not grow sour by time or accident, but was made for Vinegar at first, here is Error in *Substantia*, and Goods delivered, which made no Part of the Bargain.

And this was the Case of the Patriarch *Jacob*. His Error was *de Substantia*, his Contract was legally void, but He consented to hold it good.

In regard to Quality, as Philosophers distinguish them into *Essential* and *Accidental*, I see no reason why the Former, which partake so much of the nature of Substantials, should not class with them, and an Error of that Sort invalidate, by which the very Being of the Contract is affected. But if it extends not to set aside the end of Matrimony; if the Mistake be so trivial, that my Judgment is neither misled, nor the Purpose of my Covenant defeated; if, for instance, I take her Name to be *Titia*, whereas it is really *Sempronia*, the Contract is good beyond all Doubt or Contradiction.

*Si in nomine dissentiamus, verum de corpore constat, nulla Dubitatio est, quin valeat Emptio et Venditio: Nihil enim facit Error nominis, cum de corpore constat*¹.

It may be asked how then comes it to pass, what some Civilians hold, that Error in *Conditione*, in Rank or Quality, had sometimes a different Effect in the Roman Law?

*Ait Paulus, Oratione Divi Marci cavetur, ut si Senatoris filia Libertino nupsisset, nec Nuptiae essent, quam et SCtum secutum est*².

And consequently, if such Persons were mistaken in the Condition of those they matched with, the Marriage was null *ab initio*.

I answer this was peculiar to the Roman Law. For there Senators, and their Children, were precluded the Marriage of *Libertini et Libertinae*: Therefore such Marriages being prohibited, this *Accidental* Consideration becomes as it were *Substantiated* by Law; and all Errors concerning it would operate in the same manner, as those Primary and Fundamental Mistakes would do, which We have been lately considering.

To

To a Contract grounded upon ERROR, it is natural to add an Inquiry, what will be the Effects of a Marriage, that owes its Being to VIOLENCE. Where the Answer is obvious, viz. That the Will or Consent of one of the Contracting Parties, which is so essential upon this Occasion, is absolutely wanting, *propter necessitatem impositam contrariam voluntati*³. ³ D. 4. 2. 1.

*Vis furi maxime est adversaria*⁴.

And these Texts⁵, with many others, are brought to prove it, if it wanted it.

And indeed all Laws have been so favourable to a Point so important, as This is (where so much depends upon Liberty of Choice, and Freedom of Will) that, whereas other Acts which were negotiated through Terror and Constraint are to be set right by *Restitutio in Integrum*, yet this Match shall be *ipso Jure* invalid, and of no force nor consequence.

But here, as in the instance of Error, not every light Apprehension of Violence, not every Womanly Fear (though much is given to that Sexes Tendernefs) shall be construed into Impediment⁶. For instance, the Authority of those, who have some right to recommend, and almost to exert every Power on this side down-right Compulsion: a Submission that is in great measure derived from Reverence, and owes more to filial Respect than real Approbation, shall not be comprehended here.

*Si Patre cogente ducit uxorem, quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter invitos non contrahitur: maluisse hoc videtur*⁷.

The Violence here spoken of may be ratified by the Consent of the Party. And the Reason is plain and natural. The Person so consenting is not bound by the first Will, which was *vi et metu extorta*, but by the second and subsequent, which was *ultronea*. And indeed any spontaneous Act of the complaining Party, done in the mean space, in regard to the Premises, shall purge the Fear, and be deemed *Ratihabitio*.

The Rape of the Sabines has been often brought to illustrate this last Point: as a Marriage, which had at first no Foundation, by being grounded upon Force and Ravishment, but what did *convalescere* by length of time, and the yielding and forgiving Temper of the Sex. Indeed in the Nuptial Ceremonies of this Country, They tell you of many which owed their Original to this very History, and carry with them the Evidence of an Event, on which the Empire of the World was founded. I do not assent to that Doctrine so heartily as others, because I think some of them may be accounted for upon much fairer Principles. The seeming Violence with which the Bride is taken from her Mother's Lap: the Lifting her over the Threshold⁸, and many other Incidents in the Ceremony, would be as proper in the Rites of any other Nation, that did not owe its Foundation to an Accident of this kind, as they are in the Roman System. There is a Propriety, that a Sex, whose Modesty is their Charter, who, by a great Consent

⁴ Cic. pro Caecin. § 2.

⁵ D. 4. 2. 21. 3.

And 23. 2. 21.

22. 28.

45. 1. 134. pr.

50. 17. 116.

C. 5. 4. 12. and

14.

⁶ D. 4. 2. 6.

1. 7. pr. eod.

1. 9. pr. eod.

⁷ D. 23. 2. 22.

⁸ Plutarch, in

Romulo, be-

low, pag. 309.

And Quaest.

Rom. 29.

of Nations, are to be solicited into this Union, and——for a while to refuse it, should in these delicate Circumstances, be complimented with the Appearance of Constraint, and with that softer kind of Violence, which suits so well with their Condition, their Character, and Education. Thus with us, and with the Athenians, as We have seen above, the Bride is *given* in Marriage, and hardly appears upon the Face of the Stipulation to be consenting :

¹ pag. 251.
See below,
pag. 312.

² Xenoph.
Oeconom.

Εἰπέ μοι ὦ γύναι, ἄρα ἤδη κατενόησας τίνας ποτὲ ἔνεκα ἐγὼ τέ σε ἔλαβον,
καὶ οἱ σοὶ γονεῖς ΕΔΩΚΑΝ σε ἐμοί.*

³ Ter. Adelph.
IV. 5. 36.

Qua ratione isthuc? quis despondit? quis dedit?
Cui, quando nupsit? Auctor his rebus quis est?

⁴ ad Ter.
Andr. IV. 5. 2.

So that *Donatus*⁴ should say: *Summa Potestas Nuptiarum in Patre Puellae est.*

And though We know what these things mean,

⁵ Apollon.
Rhod. IV.
194.
⁶ Apolog.

Τὴν μὲν ἐγὼν ΕΘΕΛΟΥΣΑΝ ΑΝΑΞΟΜΑΙ οἶκαδ' ἀκοίῳ,†

or, according to the Comedian, *Scio, Voluntate tua coactus es: or Apuleius*⁶,

Cum aliquid ejusmodi velle coeperunt, malint coactae videri,

yet the Moral is sound and warrantable. This Compulsion testifies the Retirement and Abstraction that attended their Education; is a Pledge of that Honour and Chastity, which They should bring with them to this Solemnity; and guaranties the Modesty and Decorum that is to sweeten and recommend the Remainder of this Alliance.

Among the Instances of Force, which the Writers of Roman Antiquities are forward to produce upon this occasion, one is said to be a violent Forcing of the Bride from her Mother's Lap. I think the Passages do not prove it. And let any one judge, if they are expressive of that milder Violence We have been speaking to, and not rather one of a much more disadvantageous Nature.

Tunc me gremio suo Mater infelix tolerans, mundo nuptiali decenter ornabat, mellitisque suavis crebriter ingestis, jam spe futura liberorum votis anxius propagabat: cum irruptionis subitae gladiatorum impetus ad belli faciem saeviens, nudis et infestis mucronibus coruscans, non caedi, non rapinae manus afferunt, sed denso conglobatoque cuneo cubiculum nostrum invadunt protinus, nec ullo de familiaribus nostris repugnante, ac ne tantillum quidem resistente, me miseram, exanimem saevo pavore, trepidae de medio matris gremio rapuere.

⁷ Apul. Metam.
I. 4. pag.
81. Edit. Pric.

* Dic mihi, uxor, num intelligis cujus rei gratia et ego te accepi, tuique parentes te mihi dederunt?

† Hanc Ego haud invitam ducam domum uxorem.

*Quid face Trojanos atra vim ferre Latinis,
Arva aliena jugo premere, atque avertere praedas,
Quid soceros legere, et gremiis abducere pactas?*

* Virg. X.
Aen. 77.

And yet there are some Passages in Antiquity, that favour this Conceit :

*Rapi simulatur Virgo ex gremio Matris, aut, si ea non est, ex proxima
necessitudine, cum ad virum trahitur, quod videlicet ea res feliciter
Romulo cessit.*

° Festus.

*Tu fero juveni in manus
Floridam ipse puellulam
Matris e gremio suae
Dedis. O Hymenae Hymen,
Hymen o Hymenae.*

* Catull. in
Epithalam.
v. 56.
Add. Rae-
vard. ad XII.
Tabb. Cap.
XXI.

Before I shut up this Consideration, let me dispute the Rationale of another Ritual with these Ravishers of their fair Guests : allowing the Record of the original Fact all the Authority it can ask.

*Virgo una longe ante alias specie insignis a globo Talassi cujusdam raptā
fuerit, multisque sciscitantibus, cuinam eam ferrent, identidem, ne
quis eam violaret, Talassio ferri clamitatum. Inde Vox Nuptialis
facta.*

* Liv. I. 9.
Add. Plu-
tarch. in Ro-
mulo.

To this Account Plutarch in his Life of Pompey gives his Testimony, and adds, that of all the Traditions about this matter, for there were several, this was the most probable.

*Praeluxere Faces, velarunt Flammea vultus :
Nec tua defuerunt verba, Talasse, Tibi.*

* Martial. XII.
42. 3.

This also had a Moral, and a Conjugal Lesson. To which Varro and Plutarch were possibly no Strangers. The latter of whom writes thus :

Διατί ὁ πολυθρύλλητος ἀδελφαι Ταλάσιος ἐν τοῖς γάμοις ; πότερον ἀπὸ τῆς
ΤΑΛΑΣΙΑΣ ; καὶ γὰρ τὸν Τάλαρον Τάλασον ὀνομάζουσιν, καὶ τὴν νύμφην
εἰσάγοντες, νάκος ὑποσρωννύουσι. Αὐτὴ δὲ εἰσφέρει μὲν ἡλακᾶτην, καὶ τὴν
ἄτρακτον, ἐρίῳ δὲ τὴν θυραὶν περιζέφει τῷ ἀνδρὶ.*

* Quaest.
Rom. 31.

So in his Life of Romulus, where He gives an account of this Event, He has these Words :

† Οἱ δὲ πλεῖστοι νομίζουσιν, ὡν καὶ ὁ Ἰόβας ἐς ΠΑΡΑΚΛΗΣΙΝ εἶναι καὶ παρα-
κέλευσιν Εἰς φιλεργίαν καὶ ΤΑΛΑΣΙΑΝ, ἔγω γὰρ τότε τοῖς Ἑλληνικοῖς ὀνόμασι
τῶν Ἰταλικῶν ἐπικεχυμένων. Εἰ δὲ τῷτο μὴ λέγεται κακῶς, ἀλλ' ἐχρῶντο
Ρωμαῖοι.

* Quare in Nuptiis canitur iste omnium sermone notus Talassius ? An a lanificio, quae Graecis est Talasia, Talasum pro Talaro dicentibus ? Nam sponsae introductae vellus substernunt ; ipsaque secum colum et fusum importat, ac mariti januam lana coronat.

† Plerique (inter quos est Juba) adhortationem et incitationem ad laboris sedulitatem et lanificium, quod Graeci ταλασίαν dicunt, censent, nondum id temporis Italicis verbis cum Graecis confusis.

Ρωμαῖοι τότε τῷ ὀνόματι τῆς ταλασίας καθάπερ ἡμεῖς, ἑτέραν αὖ τις αἰτίαν εἰκάσειε πιθανωτέραν. (I am persuaded the Author wrote ΟΥΚ before εἰκάσειε, and I wonder how all the Editors could digest the other Reading). Ἐπεὶ γὰρ οἱ Σαβῖνοι πρὸς τὰς Ρωμαῖας πολεμήσαντες διηλλάγησαν, ἐγένοντο συνθήκαι περὶ τῶν γυναικῶν ὅπως μηδὲν ἄλλο ἔργον τοῖς ἀνδράσιν ἢ τὰ περὶ τὴν ταλασίαν ὑπεργῶσι. Παρέμεινε γυνὴ καὶ τοῖς αὐθις γαμῦσι, τὰς δίδόντας, ἢ παραπέμποντας, ἢ ὅλως παρόντας, ἀναφωνεῖν τὸν Ταλάσιον μετὰ παιδιᾶς, μαρτυρομένους ὡς ἐπ' ἕδεν ἄλλο ὑπεργήμα τῆς γυναικὸς ἢ ταλασίαν εἰσαγομένης.

The Roman Ladies kept at home after a very old-fashioned Manner to entertain their Husbands : and there the Ensigns of their Office were not a Mattador, but a Distaff and a Spindle.

* Fabret. Inscript. p. 252.

HIC SITA EST AMYMONE MARCI OPTIMA ET PVLCHERRIMA
LANIFICA, PIA, PVDICA, FRVGI, CASTA, DOMISEDA *.
HOSPES QVOD DEICO PAVLLVM EST ASTA AC PELLIGE
HEIC EST SEPVLCRM HAVD PVLCHRV PVLCHRAI FEMINAE
NOMEN PARENTES NOMINARVNT CLAVDIAM
SVOM MAREITVM CORDE DILEXIT SOVO
GNATOS DVOS CREAVIT HORVNC ALTERVM
IN TERRA LINQVIT ALIVM SVB TERRA LOCAT
SERMONE LEPIDO TVM AVTEM INCESSV COMMODO
DOMVM SERVAVIT LANAM FECIT. DIXI. ABEI *.

* Gruter. DCCLXIX. 9.

* In vit. Anton.

So *M. Antony* married *Fulvia* the Widow of *Clodius*, whom *Plutarch* calls ἡ ταλασίαν ἔδ' οἰκερίαν φρονεῖν γύναιον *.

* Xenoph. Oeconom.

Οὐ γὰρ ἀγαπητόν σοι δοκεῖ εἶναι, εἰ μόνον ἐπισαμένη, ἔργα [Read EPIA] παραλαβῶσα, ἱμάτιον ἀποδείξαι, καὶ ἑωρακυῖα ὡς ἔργα ΤΑΛΑΣΙΑ θεραπεύειν δίδοται *.

It was for this reason, that the Slippers and the Spindle made a part in the Roman Ceremony.

* Plutarch. Quaest. Rom. 30.

Εκεῖνο δὲ πάλαι καὶ ΣΑΝΔΑΛΙΑ καὶ ΑΤΡΑΚΤΟΙ· τὸ μὲν ΟΙΚΟΤΡΙΑΣ αὐτῆς, τὸ δὲ ΕΝΕΡΓΕΙΑΣ σύμβολον *.

But why *Ενεργείας*? Where is the Antitype for *Ἀτρακτοί*, as *Οἰκωρία* was for the Sandals? Doubtless not in ΕΝΕΡΓΕΙΑΣ, where We should expect, and

confusis. Quod si hoc placet, et Romani tum *Telasii* vocabulum nobiscum usurpabant, ALIAM NON POTERIS CONIICERE MAGIS PROBABLEM RATIONEM. Nam in federe, quod Sabini post bellum pepigerunt cum Romanis, convenit ne aliam operam viris quam circa lanificium praestarent uxores: qui mos secutis nuptiis permansit, ut qui elocarent puellas, vel deducerent, vel praesentes essent, omnino *Telasio* acclamarent per lusum, testantes ad nullum aliud munus, quam lanificium, Sponsam adduci.

* Mulierculam quae neque lanificium sciret, neque domi manere.

† Non tibi satis videtur, si solum illud sciens venerit, sc. cum LANAM acceperit, quo passo exinde vestimentum conficiat, et curatura ut pensa lanificii ancillis distribuerentur?

‡ Olim etiam adjiciebantur Sandalia et Fusi, quae domi aetiae vitae, industriaeque sunt signa.

ought

ought, to find it. Correct therefore, if there be Faith in Criticism, τὸ δὲ ΕΠΙΟΥΡΓΙΑΣ σύμβολον. Thus *Hesychius*:

Ταλασιεργός. ΕΠΙΟΥΡΓΟΣ, καὶ ἡ ἐν τοῖς ταλάροις ἐργαζομένη κρόκη ἢ ἔρια.
Ταλασία. ΕΠΙΟΥΡΓΙΑ.
Ταλασιεργία. Τῶν ΕΠΙΩΝ τὰ ἔργα.
Ταλάσια. Τὰ ΕΠΙΑ.

Nay farther:

Τάλις. Λέγεται παρ' Αἰολεῦσι ἡ ὀνομασθεῖσα τινὶ Νύμφη.
Τάλις ἡ μελλόγαμος Πάρθενος¹.

¹ Suid.

¹ Hesych.

Every one knows how much Rome was indebted for their Language to the Aeolians. And so much for *Talaffio*.

Lastly, There is some Shadow of Force or Violence; and, as it is thought, of the Rape of the Sabines (for which reason it finds a place here, in the Ceremony of the *Hafta Celibaris*.

*Nec Tibi, quae cupidae matura videre matri,
Comat virgineas Hafta recurva comas*².

² Ovid. II.
Fast. 559.

Διαμένει δὲ μέχρι νῦν τὸ τὴν νύμφην αὐτὴν ἀφ' ἑαυτῆς μὴ ὑπερβαίνειν τὸν ἔδον εἰς τὸ δωμάτιον, ἀλλ' αἰρομένην εἰσφέρεισθαι, διὰ τὸ καὶ τότε κομισθῆναι βιασθείσας, μὴ εἰσελθεῖν. Εἰσι δὲ λέγουσι καὶ τὸ τὴν κόμην τῆς γαμμενῆς αἰχμῇ διακρίνεσθαι δορατίς, σύμβολον εἶναι τῆς μετὰ μάχης καὶ πολεμικῶς τὸν πρῶτον γάμον γενέσθαι, περὶ ὧν ἐπιπλέον ἐν τοῖς αἰτίοις εἰρήκαμεν³. *

³ Plutarch. in
Romulo.

Διὰ τὴν τῶν γαμμενῶν αἰχμῇ δορατίς τὴν κόμην διακρίνουν; ἄρα σύμβολον εἶναι τῆς μετὰ βία καὶ μετὰ πολεμικῶς γαμμενῆς τὰς πρώτας⁴; †

⁴ Idem Quaeft.
Rom. 87.

And then that Author proceeds, according to his Custom in that Work, to recite other Opinions concerning it. All which *Festus*⁵ (what is pretty extraordinary) recounts, but omits this alone.

⁵ V. CELIBARI
etc.

See more of this in *Beroaldus*⁶, *Coelius Rhodiginus*⁷, *Briffonius*⁸, *Rosinus*⁹, and the Writers, who are numerous, upon this Passage of *Arnobius*¹.

⁶ Gruter. Fax
Art. Tom. I.
pag. 191.

⁷ XXI. Antiq.
Lect. 16.

⁸ de Ritu Nu-
ptiarum.

⁹ V. Antiqq.
37.

¹ Adv. Gentes
lib. XI.

*Cum in Matrimonio convenitis, toga sternitis lectulos, et maritorum
genios advocatis, nubentium crinem celibari hasta mulcetis.*

* *Servatur hinc etiam hodie, ne limen sponsa ipsa transcendat in cubiculum, sed sublata inferatur, quod vi tunc illatae, non ingressae essent. Addunt quidam, quando sponsae capillos hastae discriminant cuspidem, primas nuptias denotare vi et hostiliter contractas: de quibus prolixius in Quaestionibus diximus.*

† *Cur nuptiarum comam discriminant hastae cuspidem? An id signum est, primas vi et bello fuisse ductas?*

But

MARRIAGE.

But, what is the most extraordinary, something like this Ceremony was continued down as far as the Sixteenth Century, as appears from the Tenor of a Marriage-Act A°. 1511, produced by *Casalius*:

- - IN PRAESENTIA MEI NOTARII PERSONALITER CONSTITUTI ILLUSTRES D. D. FRANCISCUS DE CINQUINIIS ET IVLIA DE ASTALLIIS ANIMO ET INTENTIONE MATRIMONIUM INTER SE CONTRAHENDI, ET PRIMO INTERROGATUS PER ME NOTARIUM DICTUS FRANCISCUS, SI VELLE PRAEFATAM IVLIAM RECIPERE IN EIVS LEGITIMAM VXOREM ETC. AD QVAM INTERROGATIONEM ETC. RESPONDIT ET DIXIT, VOLO; DEINDE INTERROGATA SIMILITER DICTA IVLIA, SI VOLEBAT SIMILITER DICTVM FRANCISCVM IN EIVS LEGITIMVM MARITVM, QVAE SIMILITER RESPONDIT, VOLO; POST QVAS INTERROGATIONES ET RESPONSIONES SVPER-IMPOSITO ENSE SVPER EORVM CAPITA, ET PRAEMISSO SIGNO VENERABILIS SANCTAE CRVCIS PRAEFATUS FRANCISCUS ACTVALITER SVBARRHAVIT DICTAM IVLIAM - - -

But besides the Consent of the Parties contracting, much regard must
² D. 23. 2. 2. be paid to the Consent of others. For, according to *Paulus*²,

Nuptiae consistere non possunt, nisi consentiant omnes: id est, qui coeunt, quorumque in potestate sunt.

It is not to be wonder'd, that in such a Constitution as the Roman, where Children were so much their Father's Property, His Concurrence should be deemed so essential³.

³ D. 23. 2. 34.
 pr.
 C. 5. 4. 16.
 5. 4. 18.
 5. 17. ult.

Iustas autem Nuptias inter se Cives Romani contrahunt, qui secundum praecepta Legum coeunt, masculi quidem puberes, feminae autem viripotentes, sive Patresfam. sint, sive Filiifam.: dum tamen, si filiifam. sint, consensum habeant parentum, quorum in potestate sunt. Nam hoc fieri debere et Civilis et Naturalis Ratio suadet⁴.

⁴ J. 1. 10. pr.

From these Words of *Justinian* I shall draw out some Observations, that will furnish all that I have to say upon this Head.

(1). Here are two Reasons or Foundations for this Concurrence, a Civil one, and a Natural one.

(2). The Civil Reason is the *Jus Quiritarium*, the Right which went along with the *Patria Potestas*. The Idea of a Roman Father was made up more of Authority than Paternity.

⁵ D. 50. 16.
 195. 2.

Pater autem familias appellatur, qui in domo dominium habet: recteque hoc nomine appellatur, quamvis filium non habeat: non enim solam personam ejus, sed et jus demonstramus⁵.

⁶ Festus.

Familia in liberis hominibus dicebatur, quorum dux et princeps generis vocabatur Pater et Mater Familiae⁶.

(3). In

(3). In this System therefore of Government, nothing ought to be transacted without the Father's Concurrence. But We see him particularly and highly interested in the Succession and Derivation of His Authority: *Ne invito suus Heres adgnascatur*.

(4). There may be some Force in the Observation, viz. that *Justinian* here inverts the Order, and writes *et Civilis et Naturalis Ratio suadet*. As if He had said, "It is owing principally to Civil Considerations; it has its Foundation there: and *Natural* Considerations "are not against it".

(5). I am persuaded that the Roman Law in this respect, paid more Attention to the *Patria Potestas*, and *Dominium Quiritarium*, to the Effects of its own Creation, than to the Interest, which the Father derived from the Law of Nature. For an Emancipated Son might marry without the Consent of his Natural Father⁷.

⁷ A. Faber.
Tit. de Nupt.
Princip. IV.
Contius I.
Subsecif. 4.
Gothofred. ad
D. 23. 2. 25.
⁸ D. 23. 2. 25.

(6). On the other hand, while the Father's Authority subsisted, nothing could dispense with this Consent. Thus, though the Privileges of the Sword were great in Rome, yet even the Service of the State, with all the Emoluments attending that Profession, could not defeat this Concurrence, for it did not affect the Father's Authority⁹.

⁹ D. 23. 2. 35.

(7). This Consent was so necessary, that the Renewal of a Contract, which was dissolved before Celebration, required the Concurrence of the Father, as much as that Concurrence was required in the first Instance¹.

¹ D. 23. 2. 18.
C. 5. 4. 7.

(8). This Consent was also so necessary, that the Emperor and all the Lawyers tell us, that no Marriage is good till this Consent is obtained:

In tantum ut Jussus Parentis praece dere debeat.

² J. 1. 10. pr.

That it can have no Retrospect to hallow or sanctify what went before it³. And indeed this Doctrine is perfectly agreeable to their Notions of *Ratihabitio* or Ratification. *Ratihabitio* properly takes place in cases where things are not concluded, and no Forfeit already made to Law. The Want of the Father's Consent was an Impediment to the Loyalty of Marriage, which no subsequent Concurrence can take off. For that would be to operate against Law, where Law has taken place.

³ D. 1. 5. 11.
23. 2. 65. 1.
48. 5. 13. 6.

(9). However by some Constitutions of *Justinian*, it has been imagined that the old Stream of Law was diverted into another Channel, and that the Ratification of the Father would stand good *a parte ante*⁴.

⁴ See C. 4. 28.

(10). The *Natural* Reason is founded on the Duty, Honour, and Reverence, which our Parents are intitled to upon all Occasions, but especially in an Affair of so critical a Nature, and so great a Concernment.

⁵ 16. 25.
Haber Prae-
lect. ad Inst.

(11). It is only a Matter of *Natural Reason*, not *Natural Right*: Highly proper to be obtained, but not *sua natura* of that Weight, as that the Want of it shall invalidate a Marriage-Contract. If it were Natural Law, no Nation ought to dispense with it, as many have done.

Tit. de Nupt.
§ 10. et ad
Pandect. Tit.
de R. N. § 5.

(12). Though the Mother in the Eye of the Roman Law could not be supposed to have her Children in her Power⁵, yet the Natural Reason in some

⁵ J. 2. 19. 3.
C. 8. 48. 5.

⁶ D. 27. 10. 4. some measure pleads for her Consent⁶, and may fairly be supported by Civil Sanction, at least upon a deficiency of Father and Guardians.

(13). The Civil Reason for the Disposal of a Son, fails in the Disposal of a Daughter. She does not affect the Father's *Jurisdiction Patrimonialis*, by bringing in an unwelcome Successor, because She leaves that Jurisdiction, when She marries; and the Father of the Husband is more concerned in that Event than the Father of the Wife⁷.

⁷ D. 50. 16. 196. 1.

(14). However Natural Reason here pleads as strong, if not much stronger, for the Father's Concurrence. The supposed Imbecility of Judgment almost puts the whole Transaction out of her Choice, as We observed lately from *Donatus*⁸.

⁸ pag. 306.

⁹ Homer. Z. Odyss. 286.

¹ Homer. B. Odyss. 52.

² Euripid. Andromach. v. 987.

³ Musaeus v. 179.

⁴ Evaristus ad Africanos Episcopos.

⁵ D. 23. 1. 12. 1.

⁶ C. 5. 4. 18.

⁷ D. 23. 2. 16. 2.

Καὶ δ' ἄλλη νεμεσῶ, ἢ, τις τοιαῦτά γε ῥέζοι,
 Ἡ τ' ἀέκητι φίλων πατρός καὶ μητρός ἐντων
 Ἀνδράσι μίσγῃσθαι, πρὶν γ' ἀμφάδιον γάμον ἔλθειν⁹. *
 Οἱ πατὴρ μὲν ἐς οἶκον ἀπερρίγασιν νέεσθαι
 Ἰκαρίε, ὥς καὶ αὐτὸς ἐεδνώσαιτο θυγάτρεα,
 Δοίῃ δ' ὧ καὶ ἐθέλοι, καὶ οἱ κεχαρισμένος ἔλθοι¹. §
 Νυμφευμάτων μὲν τῶν ἐμῶν πατὴρ ἐμὸς
 Μεριμνᾷν ἔξει, καὶ ἐμὸν κρίνειν τάδε². †
 Ἀμφαδὸν καὶ δυνάμεσθαι ΓΑΜΟΙΣ ΟΣΙΟΙΣΙ πελάσσαι.
 ΟΥ ΓΑΡ ΕΜΟΙΣ ΤΟΚΕΕΣΣΙΝ ΕΠΕΤΑΔΕΝ³. ||

*Aliter legitimum non fit Conjugium, nisi ab his qui super ipsam feminam dominationem habere videntur*⁴.

She may upon the Matter be compelled, and is always supposed to consent, unless She evidently dissent: And She has not the Power of dissenting, unless in the case of a scandalous Match, a *Sponsus turpis*, or a Husband, that is infamous⁵. Nay farther, a Daughter, (under XXV.) though emancipated, could not contract for herself, not even in her Widowhood⁶.

(15). It is for all these Reasons, that a Grand-son in *Avi potestate constitutus*, the Father living, and not emancipated, must have the Consent both of that Father, and of that Grand-father: Whereas to the Marriage of a Grand-daughter in the same Circumstances, the Consent of the Grand-father would be sufficient⁷. The Reason of the Difference was this. The

* *Etenim alii succensuerim, quaecunque utique talia fecerit, Quae scilicet invitis charis patre et matre viventibus Viris misceatur, priusquam palam nuptiae advenerint.*

§ *Qui patris ad domum metuunt adire Icarii, ut ille dotet filiam, Et det cuicunque velit, et qui illi gratus advenerit.*

† *Desponsationis quidem meae pater meus Curam habebit, et non est meum statuere hoc.*

|| *Palam non possumus, nuptiis legitimis jungi; Non enim meis parentibus placet.*

Grand-

Grand-daughter passed into the Family of her Husband, and her Children after her: but in the case of the Grand-son, the Remainder of Power and Jurisdiction was in the Father (after the Decease of the Grand-father) which could not be cut off or defeated without that Father's Consent. There is a similar Case in Adoption. If I adopt a Person *loco Nepotis*, my Son must consent, because I bring a Person into his future Family: but, on the contrary, if I give my Grand-son to be adopted into another Family, the Consent of his Father is not necessary⁸. Here Adopting and Giving in Adoption is like Marrying and Giving in Marriage.

(16). This leads us to the best Exposition of that famous Text⁹, ^{9 D. 23. 2. 3.}

Si Nepotem ex Filio, et Neptem ex altero Filio in Potestate habeam, Nuptias inter eos me solo auctore contrahi posse Pomponius scribit, et verum est.

The Grand-father, according to my last Rule, might fairly by his *sole Authority* dispose of his Grand-daughter, but not of his Grand-son. How comes it to vary, when He marries this Grand-son and this Grand-daughter *together*? Why was the Consent of the Father necessary to the Marriage of his Son in the one case, and not in the other? This must be owing to the *Presumption* of the Father's Consent. For here is no Change of Family, no Alienation of Inheritance, no Probability of an unwelcome Successor, *ut invito suus Heres adgnasceretur*. This, I say, is the fairest Answer to an Objection, which in the whole Body of the Roman Law is the only Passage that tends to dispute, or set aside, the Father's Consent. It is idle to say, as it has often been said, that this Case must be supposed, where the Father was dead or emancipated. For then the Doctrine of the Grand-father's Authority would be true *without* this instance; and not obtain *only* where He matches his Grand-son with his Grand-daughter, which yet upon the Face of the Law seems to be the Supposition.

(17). The Effect of Marriage without this Consent was Illegitimacy¹. ^{1 J. 1. 10. 12.}

*Impares enim Nuptiae, et praeterea in villa sine testibus, et patre non consentiente factae, legitimae non possunt videri: ac per hoc spurcius iste nascetur*².

² Apul. Metamorph. l. 6. p. 115. Ed. Price.

And such an Illegitimacy, as could not be wiped off. For it must be observed that the Issue of Concubines only, and no other sort of unlawful Production, were capable of being restored to Blood.

(18). But upon the whole, the *Favor Matrimonii*, and the Right which the Public had in it, has made great Concessions in the Roman Law, in regard to this Consent of the Father. For instance, it shall be deemed Consent, if He intimates his Will *per Epistolam, per Internuncium*³: If He does not publicly contradict⁴. The Law would sometimes compell it, if unreasonably with-held⁵; and Provision was likewise made for the Absence of the Father, his Captivity, Lunacy, and Want of Understanding. ^{3 D. 23. 1. 18. 4 D. 23. 1. 7. 1. 5 C. 5 4 5. D. 23. 2. 19.}

This Consent is a Point which has been much considered by all who have treated of Roman Marriages, and much may be seen in a small

⁹ ad D. 23. 2. Compass, as it is drawn together by *Gorhofred*⁹.

²⁵.
Add. A. Fa-
ber. Tit. de
Nupt. Princ.
IV.

Noodt. ad
Pandect. h. t.
Cujac. III.
Observ. 5.
Grotius II. 5.
10.

¹ Thesaur. L.
Gr.

² Vulcanius
ad loc.
Price ad Apul.
Metam. l. 4.

³ D. 38. 8. 1. 1.

⁴ D. 38. 10. 4. 1.

Another Thing which contributes to defeat this Contract, is *Proximity* or *Relation*. Relation is either by Blood or Marriage: the Former of which is called *COGNATIO* or Consanguinity. So that when those valuable Glosses published by *H. Stephens*¹, through a Mistake of the Transcriber, expound *Cognatus* and *Cognatio* by *Εὐγενής* and *Εὐγένεια*, every one readily apprehends, We must read *ΣΥΓΓΕΝΗΣ* and *ΣΥΓΓΕΝΕΙΑ*². There is no one can doubt it. *Cognati* therefore, according to *Vlpian's* Definition³, are so called, *quasi ex uno nati, aut, ut La-beo ait, quasi commune nascendi initium habuerint*. To which may be added *Modestinus*⁴: *Cognati ab eo dici putantur, quod quasi una communiterve nati, vel ab eodem orti progenitive sint*. And accordingly Consanguinity or Cognation is thus defined by the Moderns:

Vinculum Personarum ab eodem stipite descendentium, carnali Propagatione contractum.

But it must be observed, that *Cognatio*, besides its general use, submits to be its own *Species*⁵. For that Branch of Consanguinity, which comes by the Mother, is likewise called by the peculiar and now-restrained Appellation, *Cognatio*; whereas the Relation by the Father's Side or Blood is called *Agnatio*. So the Glosses, under the last Emendation:

Cognatus. Συγγενής ἀπὸ μητέρας

All that I have now advanced will be clear from the following Laws:

*Nomen Cognationis a Graeca voce dictum videtur, Συγγενής enim illi vocant, quos Nos Cognatos appellamus*⁶.

⁶ D. 38. 10. 10.
1.

*Cognati sunt et quos Adgnatos Lex XII. Tabularum appellat. Sed hi sunt per Patrem Cognati ex eadem familia: qui autem per Feminas conjunguntur, Cognati tantum nominantur*⁷.

⁷ § 2. eod.

*Inter Adgnatos et Cognatos hoc interest, quod in Adgnatis et Cognati continentur: in Cognatis non utique et Adgnati. Verbi gratia, Patris Frater, id est, Patruus, et Adgnatus est et Cognatus: Matris autem Frater, id est, Avunculus, Cognatus est, Adgnatus non est*⁸.

⁸ D. 38, 7. 5.

The last Passage has afforded much matter for Dispute, and indeed, at first sight, seems to contradict my Assertion, that *Cognatio* was a Genus, comprehending under it a Species called *Adgnatio*: when *Modestinus* in the Law last cited expressly says, *In Cognatis Adgnati non continentur*. Nothing can be easier than the Solution. This will always be the Case, where the same Word stands for the Genus and for a Species of it also. Put the Case in Adoption⁹, and let us apply these Words of *Modestinus* there:

⁹ See above,
pag. 146.

Inter Arrogatos et Adoptatos hoc interest, quod in Arrogatis et Adoptati continentur: in Adoptatis non utique et Arrogati.

Why? Because the Term of One Species, as *Cognatio*, *Adoptio*, fits both Species alike (by being the Term of the Genus also), but that of the Other, not so. The Logicians would set this to a Tune, but this is the plain Song of the Matter.

This Distinction of *Agnati* and *Cognati* has its use in some Parts of the Roman Law, and was proper enough to be laid before my Reader. However for the purposes We are now engaged in, They may pass without Distinction. The Law in incestuous Copulations regards not this Difference of Blood. We shall therefore not regard it likewise, but comprehending both under the common Name of *CONSANGVINEI*, pass on to inquire what that *other* Relation means, by which I said that Incest might also be contracted, and which is called *AFFINITY*.

Affinity is defined *Proximitas Personarum per Nuptias contracta*.

*Adfines sunt Viri ex Vxoris Cognati, dicti ab eo, quod duae Cognationes, quae diversae inter se sunt, per Nuptias copulantur, et altera ad alterius Cognationis finem accedit; namque conjungendae Adfinitatis causa fit ex Nuptiis*¹.

¹ D. 38. 10. 4. 3.

Thus

*Adfines: Αγγιτέμων. καὶ ὁ κατ' ἐπιγαμίαν Συγγενής*².

² Gloss. Vet.

*Adfines: In agris Vicini, sive Consanguinitate conjuncti*³.

³ Festus.

Festus is justified in the first Part of his Exposition by a Passage of *Paulus*⁴: In the second is very blameable in calling Affinity by that very Expression He ought to have guarded against, and indeed against which He was upon the very point of guarding his Reader. For the Purport of his Gloss was to inform us, that Affinity was *not* Consanguinity.

⁴ D. 10. 1. 12.

Having thus stated the two different Forms of Relationship, I proceed to observe, that there is a *Natural* Incest, and a *Civil* Incest. Or, in other Words, the Proximity of some Persons is held so sacred and reverential, that an Alliance, or Conjunction of such would be a Violation of the Law of Nature: whereas the Rules of Positive Institution may sometimes have laid this Prohibition, where Nature was less express, however consents to be concluded:

*Quare Mulier tunc demum eam poenam, quam Mares, sustinebit, cum Incestum Jure Gentium [i. e. Jure Naturae] prohibitum admiserit: nam si sola Juris nostri observatio interveniet, Mulier ab Incesti crimine erit excusata*⁵.

⁵ D. 48. 5. 38. 2.

To understand this, let us see what Proximity is. Proximity is discovered by the Computation of Degrees.

Degrees are the Steps of the Distance between two Persons in the Genealogical Line:

⁷ D. 38. 10. 10.
10.

Gradus autem dicti sunt a similitudine Sclarum, locorumve proclivium, quos ita ingredimur, ut a proximo in proximum, id est, in eum, qui quasi ex eo nascitur, transeamus⁷.

The Genealogical *Line* is a Series of Persons, of the same Stock, or Alliance, in the regular Order of Generation or Descent. Which Line is either *Right* or *Oblique*.

The *Right Line* either *ascends*, and gives us all our Ancestors; or *descends*, and contains all our Posterity.

(This is called the *Ascending* or *Descending Line*, in continuation of the Methaphor, just now observed, from the Likeness to Steps or Stairs,

Be it observed here *obiter*: When *All* who went before us, are called *Majores*, and *All* who come after us *Minores* or *Poster*, this is not according to the exactest Propriety, as We gather from *Servius*⁸:

⁸ ad Virg.
VIII. Aen.
268.

Minores non dicimus, nisi cum Graduum deficit nomen, ut puta Filius, Nepos, Pronepos, Abnepos: ubi isti gradus defecerint, merito jam dicimus Minores. Sicut etiam Majores dicimus post Patris, Avi, Proavi, Abavi, Atavique vocabulum.

And not unlike it, *Paulus*, who wrote a Treatise upon the Degrees,

Parentes usque ad Tritavum apud Romanos proprio vocabulo nominantur: ulteriores, qui non habent speciale nomen, Majores appellantur. Item Liberi usque ad Trinepotem: ultra hos Posteriores vocantur⁹.

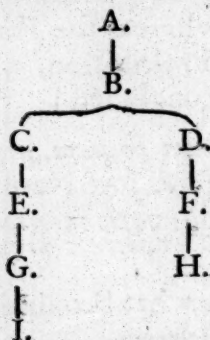
⁹ D. 38. 10.
10. 7.

This Text of Law should be thus corrected: *ultra hos Posteriores omnes*

¹ I. Var. Con-
ject. 5. *vocantur. See D'Arnaud¹.*)

To proceed: The *Oblique Line* contains a Series of Persons, not in the direct order of Succession one under another (as the *Right Line* does), but made up of part of two *Right Lines*, concurring in one common Stock. Which two Lines are called *Collateral*.

This oblique Line is either *Equal*, when the two Parties in question are equi-distant from the common Stock: or *Unequal*, when one Party is nearer in degree to that common Stock, or farther from it.



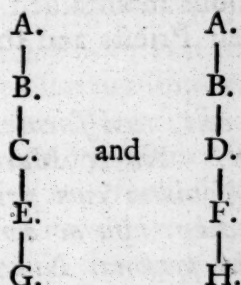
Here the *Degrees* or Stages of Generation are marked by the Letters A. B. etc. and the *Lines* are the Series of those Letters.

The

MARRIAGE.

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The Line A. B. C. E. G. I. and also the Line A. B. D. F. H. is a Right Line, viz. thus



and to be considered either Ascending or Descending, according as You take your Stand. All above E. (or F.) is the Ascending; and all below E. (or F.) is the Descending Line, when E. (or F.) comes to be the Person in Question.

The Line G. E. C. B. D. F. H. (as also a Portion of it C. B. D.) is an oblique or collateral Line.

B. is a common Stock, and the Parent of the two Lines C. E. etc. and D. F. etc.

E. and F. are in *Linea Aequali*.

G. and F.; as also I. and F.; E. and D.; G. and D. etc. are in *Linea Inaequali*.

This being premised, Two Considerations will include the whole Affair of Consanguinity: One of which concerns the *Right*, and the other the *Oblique*, Line.

(1).

Marriage in the Ascending and Descending Line are prohibited in ²D. 23. 2. 53. *infinitum*; i. e. I cannot marry my Mother, nor her Mother, and so upwards to Eve. Nor again can I marry my Daughter, nor her Daughter, and so downwards for ever.

*Nuptiae consistere non possunt inter eas personas quae in numero Parentium Liberorumve sunt, siue proximi siue ulterioris gradus sint ad infinitum*³.

This is that kind of Incest, to which Nature is so averse, and of which We have seen something above¹.

Jure Gentium [i. e. Naturali] *Incestum committit, qui ex gradu Ascendentium vel Descendentium uxorem duxerit*⁴.

Cui Fas implere Parentem,

Quid rear esse nefas?

This We have seen formerly to be so shocking to natural Conception, that very surprizing Stories are told us of the Abhorrence which even Animals have expressed upon the Occasion⁵:

Δέος

¹⁷ Add. C. 5. 4.
³ pag. 107.
⁴ D. 23. 2. ult.
⁵ Lucan. VIII. 409.
⁶ Plin. VIII. 42.
Aristot. IX. Hist. Anim. 47.
Aelian. III. H. A. 47.
IV. 7.
Varro de R. R. II. 7.
Oppian. I. Cyneget. 236.
H. Steph. Apolog. for Herodot. pag. 55.
Edit. Fol. Lond. 1607.
Antigon. Mirab. C. 59.

Δέρκεο τῶν ἀλόγων ζώων γένος· ἔ γὰρ ἐκεῖνων
Φύσις ἀτιμάζει θεομία συζυγίης.⁵*

⁵ Agathias
Scholast. An-
tholog. I. 78.

Some of the Eastern Nations maintained these Marriages, nay, held them sacred, and took their Priests and their Princes from this abominable Mixture⁶.

⁶ See above,
pag. 107.
Add. Sext.
Empir. I.
Pyrrh. Hypo-
top. 14. III.
24.
Philo de Legg.
Special. pag.
301. Edit.
Mang. Vol. II.
Not. ad loc.
Minut. Felix.
c. 31.

Plane Persae, Ctesias edit, tum scientes, quam non horrentes, cum Matribus libere fiunt. Sed et Macedones id quod probaverunt palam est factitare, siquidem cum primus scenam eorum Oedipus intravit trucidatus oculos, risu ac derisu exceperunt. Tragoedus consternatus, retracta persona, Nunquid, ait, Domini, displicui Vobis? Responderunt Macedones; Immo tu quidem pulchre. At Scriptor vanissimus, si finxit, aut Oedipus dementissimus, si ita fecit⁷.

⁷ Tertullian.
ad Nationes
lib. 1.
Add. Apolo-
get pag. 11.
Edit. Rigalt.
1641.

Nay, this Heresy in Natural Law crept into some of their Schools of Philosophy. For Zeno and Chrysippus maintained this Prohibition to be absurd and unreasonable⁸.

But it is maintained by the best and most serious Writers, that this Mixture is the Aversion of Nature.

⁸ Sext. Empir.
III. Pyrrhon.
Hypotypof.
24. et 25.
Epiphanius in
Comp. de Fide
Cathol.

⁹ Nov. 12. 1.
¹ Plato de LL.
l. 8.

— μάθοι σωφρονεῖν, καὶ εἶσω τῆς ΦΥΣΕΩΣ μένειν, ἀλλὰ μὴ τρυφᾶν τε καὶ ἑρᾶν ΥΠΕΡΟΡΙΑ καὶ τῶν παραδεδομένων ἡμῶν ἐκ τῆς ΦΥΣΕΩΣ καταυθαδιάζεσθαι.⁹†

Καὶ περὶ υἱέος ἢ θυγατρὸς ὁ αὐτὸς νόμος ἀγραφὸς ὢν ὡς οἷόν τε ἱκανώτατα φυλάττει, μήτε φανερώς μήτε λάθρα συγκαθεύδοντα, ἢ πῶς ἄλλως ἀσπαζόμενον ἀπλεσθαι τέτων. — Τὸ ταῦτα εἶναι φάναι μηδαμῶς ὅσια, θεομισῇ δὲ, καὶ αἰσχρῶν αἰσχισα¹.§

Οταν δὲ δὴ αἶτε γυναῖκες καὶ οἱ ἄνδρες τῷ γεννᾶν ἐκδῶσι τὴν ἡλικίαν, ἀφήσομέν τε ἐλευθέρως αὐτὰς συγγίνεσθαι ἢ ἂν ἐβέλωσι, πλὴν θυγατρί, καὶ μητρί, καὶ ταῖς τῶν θυγατέρων παῖσι, καὶ ταῖς ἄνω μητρόσ. Καὶ τὰς γυναῖκας αὖ, πλὴν υἱεῖ, καὶ πατρί, καὶ τοῖς τῶν τοιούτων, εἰς τὸ κάτω καὶ ἐπὶ τὸ ἄνω².||

² Id. de Re-
pub. l. 5.

Many have been the Positions of Lawyers and Philosophers, concerning the Principle which this Doctrine is to be resolved into. The Inequality of Age, which must necessarily attend such an Union, is what Socrates

* *Aspice irrationalium animalium genus: non enim eorum Natura conturbat leges Connubii.*

† *Discat caste vivere, et intra naturam se continere, non autem delectari, et amare ultra terminum traditum nobis a natura.*

§ *A Filio quoque aut Filia eadem Lex nec-scripta quidem disertissime remouet, ne vel palam vel clam cum ea concumbat, aut alio etiā modo complectatur. — Quod nihil horum fas esse ait, sed ea Deo invisā esse, et turpiū omnium rerum turpissima.*

|| *Quando igitur jam mulieres et viri aetate generatione aptam egressi fuerint, licere viris dicemus, cuicunque voluerint, praeterquam filiae et matri, et filiarum filiabus et matre maioribus, commisceri. Licere et mulieribus cum quolibet copulari, praeterquam filio atque patre, ac superioribus et inferioribus eorundem.*

seem'd

seem'd to pay the greatest regard to, but surely is of too slight a Consideration to bear so great a Weight, as that of Natural Prohibition. The Necessity of a Dispersion of Families, *etc.* has no better Title, and has but little to do with the primary Laws of Nature. It is doubtless a Breach of that *Pudor Naturalis* that God has implanted in every Subject of this Relation. The Violence done to Nature, thus made to recoil upon herself, whose Effort and Disposition it is to propagate, by Succession, one Generation upon another, and not by those We bred, or those that bred Us, gives us the natural Detestation of this abominable Mixture. There is again an Abhorrence even in the very Idea, to have the Notions of Honour, Awe, Religion, and Duty mix with those of Carnality and Licentiousness. And lastly the Reverence due to the Father's Memory, in one part of the Contemplation (for it is held that both Conjunctions are not equally horrible, as in *Agathias Scholast.*³

³ Lib. 2.

Οὐ μόνον ἀδελφαῖς τε καὶ ἀδελφιδαῖς ἀνέδην μιγνύμενοι, ἀλλὰ πατέρες τε θυγατράσι, καὶ δὴ τὸ ΠΑΝΤΩΝ ΑΝΟΣΙΩΤΕΡΟΝ (ὧ Νόμοι γε καὶ Φύσις) υἱοὶ ταῖς τεκέσσαις. †

And there have been Nations, who have shudder'd at the one, and made no scruple of the other) may be of some Consideration, perhaps not enough of itself, but what will very well swell the Account :

*Scandere quin etiam thalamos hic impius heres
Patris, et immeritae gremium incestare Parentis
Appetuit, proprios monstro revolutus in ortus*⁴.

⁴ Stat. I.
Theb. 233.

And this is the Language of many Writers, διὰ τὴν εἰς τὸν πατέρα τιμὴν, and πατρός εὐνὴν κατὰ ισχύειν *.

To all this may be added that Horror which generally arises in the mind from the Confusion of Duties, and from so shocking a Mixture of Names, Order, Degrees, Relation, and Dependance. This the Poets have more than one touched in very lively Colours, in the case of *Oedipus*, and others

Ω γάμοι, γάμοι,
Εφύσαθ' ἡμᾶς, καὶ φύσεύσαυτες, πάλιν
Ανεῖτε ταῦτόν σπέρμα, καὶ πεδείξατε
Πατέρας, ἀδελφεύς, παῖδας, αἱμ' ἐμφύλιον,
Νύμφας, γυναῖκας, μητέρας τε, χῶπόσα
Αἰσχρὸς ἐν ἀνθρώποισιν ἔργα γίνεται. †
*Sed Rex cruentus, praemia qui saevae necis,
Sceptra, et nefandos occupat thalamos patris,*

⁵ Sophocle.
Oedip. Tyr.
v. 1416.
Add. Longin.
Cap. XIX.

† Non solum ad libitum miscentes cum sororibus et fratrum filiabus, verum patres cum filiabus, quod omnium est maxime nefandum, (O Leges et Natura!) filii cum matribus.

* Ob reverentiam Patri debitam — defuncti patris thalamum conspurcare.

† O Nuptiae, Nuptiae,
Genuistis nos, et, postquam genuistis, iterum
Remissistis idem semen, et in lucem tulistis
Patres, fratres, liberos, sanguinem cognatum,
Sponsas, uxores, matresque, et quotquot
Turpissima inter homines opera censentur.

⁴ Senec. Oedip. Act. III.
v. 126.

⁵ Id. Theb.
v. 133.

⁶ Ovid. X.
Met. 346.

*Invisa proles, sed tamen peior parens
Quam natus : utero rursus infausto gravis,
Egit qui in ortus semet, et matri impios
Foetus regessit, quique nec mos est feris,
Fratres sibi ipsi genuit, implicitum malum,
Magisque monstrum Sphinge perplexum sua ⁴.
Quid simile posuit ? quod tam inextricabile ?
Avi gener, patrisque rivalis sui,
Frater suorum liberum, et fratrum parens,
Vno avia partu liberos peperit viro,
Ac sibi nepotes. Monstra quis tanta explicet ⁵ ?*

*Nec, quot confundas et jura et nomina, sentis ?
Tune eris et Matris pellex, et adultera Patris ?
Tune soror gnati, genetrixque vocabere fratris ?
Nec metuas atro crinitas angue sorores,
Quas, facibus saevis oculos atque ora petentes,
Noxia corda vident ? at Tu, dum corpore non es
Passa, nefas animo ne concipe : neve potentis
Concubitu vetito Naturae pollue foedus ⁶.*

This Confusion has been also well painted by *Philo*, in the Tract and Page lately cited.

Τὸ Περσικὸν ἔθος ἐνθὺς ἀποστροφεῖς καὶ μυσταζάμενος, ἀπέειπεν ὡς μέγιστον ἀνοσιέργημα. Μητέρα γὰρ οἱ ἐν τέλει Περσῶν ἄγονται, καὶ τὰς φύντας ἐκ τούτων εὐγενεστάτας νομίζουσιν, καὶ βασιλείας τῆς μεγίστης, ὡς λόγος, ἀξιοῦσιν. Οὐ τί ἂν γένοιτο δυσσεβέστερον ἀνοσιέργημα, πατὴρ εὐνὴν τελευτήκοτος, ἢν ἄψαυσον ὡς ἱερὰν ἐχρὴν φυλάττεισθαι, καλῶς ἀσχύρειν ; γήρως δὲ καὶ μητρός αἰδῶ μὴ λαμβάνειν, τὸν αὐτὸν τῆς αὐτῆς υἱὸν καὶ ἄνδρα γενέσθαι, καὶ πάλιν τὴν αὐτὴν τῷ αὐτῷ μητέρα καὶ γυναῖκα. καὶ τὰς ἀμφοῖν παῖδας, τῷ μὲν πατρὶ ἀδελφὴς, υἱὸς δὲ τῆς μητρός. καὶ τὴν μὲν ὧν ἔτεκε μητέρα τε καὶ μάμμην, τὸν δὲ ὧν ἐγέννησεν, ἐν ταύτῳ πατέρα τε καὶ ὁμομήτριον ἀδελφόν*.

This then is the First Rule about Incestuous Marriages : and relates to the Ascending and Descending (or Straight) Line, where Marriages are prohibited *in infinitum*. I say, *in infinitum* : For though some limit the Prohibition to the *first* Degree, others to the *third*, the Canon Law to the *fourth*, and others again to the *twentieth* ⁷ ; yet the Voice of Nature interposes absolutely and indeterminately : and most of the Reasons, which I have urged, will extend to any ever so distant Degree in the Scale of Descent.

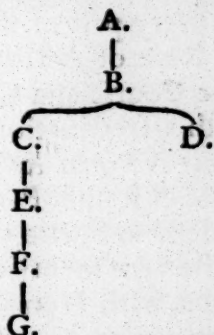
⁷ See Cocceii
Dissert. Pro-
oem. XII. Lib.
III. Cap. 4.
§ 6.

* Persicum morem palam aversatus, ut facinus atrocissimum interdixit. Honoratiores enim Persae cum matribus contrahunt matrimonia. et notos inde arbitrantur nobilissimos, regnoque, ut ferant, dignantur maximo ; quo nihil exogitari potest magis impium quam conspurcari defuncti patris thalamum, quem intemeratum conservari decuit ; neque senectuti, nec matri exhibentis reverentiam, filium eundem et maritum fieri, eandem quoque ejusdem esse matrem et uxorem, communisque liberos, patris quidem fratres, matris vero nepotes censeri : hanc prolis suae matrem simul esse ac aviam, illam filiorum patrem et germanum uterinum.

(2). The

(2.)

The second Rule respects Collaterals, and is formed in great measure upon the other, *viz.* Thus : The Marriage of those two Persons is also forbidden, where the One is to the Other *in loco Parentis*. This is called the *Respectus Parentelae*, and is best understood by reducing the Relation to a Diagram, as below. There, when you see one of the Parties in Question *immediately* subjoin'd to the common Stock, let the other be at any distance whatever, that is the Case in Point :



If C. and D. are the Children of B. the common Stock, as in the Scheme, then E. (the Daughter suppose of C.) shall not be allowed to marry with (her Uncle) D. Neither shall F. the Daughter of E, nor G. the Grand-daughter, and so on, *in infinitum*, in that Line of Generation.

My Reader will take along with him, that if Marriages are forbidden, where *one* of the Parties is immediately under the common Stock, the Prohibition must lie much stronger against a Case, where *both* are in that Situation, which is the Relation of Brother and Sister.

Thus then in two of the simplest Rules in the World is comprized the whole Doctrine of Prohibited Marriages between Persons of the same Blood. In the former case, an Exclusion is laid against such as are *Parentum in NUMERO*, in the other, *Parentum in LOCO*. There, Nature has set a perpetual Bar to every such Conjunction, as shall damage or confound the Consideration of Parentage: and Here, Civil Sanctions, by way of Fence, have thrown up a Mound, and cut off those, that but approach or resemble it.

"It is a thing extremely delicate," says a good Writer, "in regard to the Prohibition of Marriage between Relations, to fix exactly the Point, at which the Laws of Nature stop, and where the Civil Laws begin." I add, that it has been moreover a Matter of great Dispute, how far these latter should extend, and where all Impediment whatever should be suspended. The Marriage of First-Cousins, which with Us is allowed, and that of Second-Cousins, which by the Canon Law is forbidden, is a Proof of what I am saying.

S s

I shall

I shall endeavour therefore, in the Reflections which follow, to put this whole Matter upon a proper Foundation, and to reduce it to Principles of the easiest Apprehension.

I contemplate the Thing thus, and hope to prove it afterwards. Natural Law is *necessarily* concerned about the Line of Ascendants and Descendants *only*. The Tendency, the Destination of Nature is forwards, carrying on, as the other Business of Providence, so also the Succession of Mankind, as it were, in right Lines. I can see a Connection between Natural and Moral Causes, and can imagine first a strong Reluctance and an implanted Aversion in every part of the Creation, against whatever shall tend to defeat this Rule of Acting, and, as in the Case before us, endeavour to turn the Course and Order of Nature back upon itself: And next, To guard this Destination, and to maintain the Appointments of Providence, that *Natural Reluctance* of the Creation becomes the *Moral Aversion* in the Rational Part of it, which every Man, who is not lost to Shame and dead to Feeling, conceives within his own Breast, when He shudders at the very mention of such detestable Pollution, and flies even the very Idea with Horror and Abhorrence.

To proceed: This Abhorrence or Aversion of Nature being thus poured round us, by way of Sanction, to keep us from the Incestuous Mixture between the Producer and the Production: and the Union or Sameness of Blood being fixed upon for the Principle, to ground this Antipathy upon, it follows, that Nature must in Proportion be unfavourable to those Conjunctions also, which border upon that forbidden Line (though her primary Destination is not greatly hurt or defeated by it) and that in the Ratio of their Approach to it, or Distance from it.

In Consequence of this, it will be found, that Nature has no where set her Mark, or can fairly say, *Hitherto shalt Thou come, and no farther*. Or, take it thus: From that Unity of Blood and Family that in some measure links all Ages of the World together, and all the Nations in it, it follows in a philosophical Sense, that there is no Point of Relation where this Alliance is absolutely cut short; no two Generations or Degrees of Consanguinity to be given, with this Connection entirely broken, and Natural Prohibition, like a great Gulf between them. Though it is true at the same time to all Purposes, that the same Blood which for a little space ran in the Channel of one Family, clear and distinguishable, yet in process of a few Generations, by mixing in the great Ocean of Mankind, shall become

*as indistinct,
As Water is in Water.*

• Shakesp.
Ant. and
Cleop.

Having thus seen the Powers and Principles of Nature upon this Theme, let us consider the Function and Administration of the Civil Law-giver upon the same Argument.

It

It is perhaps the *primary* Intention of Human Law, as We have touched already, by the Honours it has given to what I call the *Imaginary* or *Artificial Parentage*, to guard the Interests of the *Real*: to fence in the great Prohibition of Nature by Prohibitions of its own; and therefore it throws up the *Respectus Parentelae*, rather like an Outwork, than rests in it as a Place of main Strength or real Security.

It is moreover apparent that the Civil Legislator may in a *secondary* Consideration consult the Sense of Human Nature also. I say, He is not wanting, at the same time, in supporting those implanted Aversions, which are apt to arise upon a Conjunction too near in Blood; but checks all such Alliances, as well upon their own Account, as for the sake of those which they were principally intended to guard against.

And, to proceed: In this, like as in most other Cases, it is left to Positive Law, to determine what Nature has not determined', to settle what That has left indefinite, and to ascertain the Degrees that may be allowed to unite without Impeachment or Indecency. ^{'Above, pag. 133.}

And lastly, it will appear from the Light in which I contemplate this Question, that the Roman Law has indisputably ascertained that Degree in the properest Point, that Nature, Reason, Law, and Religion, could dictate.

The Scheme being thus laid out, the Reader will expect to see these three Positions supported with some degree of Exactness, as the Whole in a manner rests upon them: *viz.*

1. That most or all the forbidden Degrees out of the Right Line depend in great measure upon the Principle, which I have supposed, *viz.* the Parental Representation.

2. That an Union between the nearest Relations out of the same Line, as that of Brother and Sister, though justly now condemned by the wisest and most civilized Nations, is yet not in *its own Nature*, and *per se* abominable.

3. That the Fourth Degree of Consanguinity is the proper Point to stop at: or, in other Words, that the Marriage of First-Cousins is lawful.

(1). First then, the Marriage between *Patruum et Neptem*, *Avunculum et Sororis filiam*, etc. stands therefore condemned by Civil Law-givers, because that *Patruus*, and that *Avunculus* in some measure represent the *Pater* or the *Avus*, or, in other Words, because they are in *loco Parentum*.

The Greek Law, I mean that of the Athenians, not only allowed, but even encouraged Conjunctions of this sort. For, in that Country, when they were once out of the Pale of Prohibitions, they could not marry too near in Blood. An Instance of this is in that Law, which has so great a Share in *Terence's Comedies*:

*Lex est, ut Orbae, qui sunt genere proximi,
Iis nubant, et illos ducere eadem haec lex jubet.*

And the Marriage of Uncle and Niece found so little Obstruction from the

the Confusion of Relation which it occasioned, that it almost became an Argument in its Favour.

Ἀδελφοὶ ἦσαν — Διόδοτος καὶ Διογεΐτων — πείθει [Διόδοτον] Διογεΐτων λαβεῖν τὴν ἑαυτῆ θυγατέρα — Διόδοτος καλέσας τὴν ἑαυτῆ γυναῖκα, ἀδελφιδὴν ἦσαν, καὶ τὸν ἐκείνης μὲν πατέρα, αὐτῆ δὲ κηδεστὴν καὶ ἀδελφὸν ὁμοματρὶον, πᾶν τὸν δὲ τῶν παιδίων καὶ θεῖον, ἡγούμενος ΔΙΑ ΤΑΥΤΑΣ ΑΝΑΓΚΑΙΟΤΗΤΑΣ —.*

* Lyfias, Edit.
Lond. pag.
506.

But such were early forbidden at Rome, and, when the Law became well-studied and digested, were looked upon with Abomination.

*Nefandissimum scelus Fratris Sororisve filiae nuptiarum, quod sacratissimis constitutionibus sub gravissima poenae interminatione damnatum est, iterato praesentis divinae sanctionis tenore modis omnibus prohibemus. Precandi quoque in posterum super tali conjugio (imopotius contagio) cunctis licentiam denegamus*³.

³ C. 5. 8. 2

⁴ C. 5. 5. ult.

However it appears from the Law last cited, and another⁴, that Dispensations had been sometimes solicited, and doubtless obtained, to celebrate them. And many Passages are not wanting, in which it appears that sometimes the Roman Law distinguished, with a Subtlety I cannot comprehend, between a Brother's Daughter and a Sister's⁵; and allowed the latter to be lawful (or, rather, as I think, dispensable) the former not.

⁵ See Gothofred. ad C. 5. 4. 17. and 5. 5. 9.

From this View, as they could sometimes look upon these Conjunctions in a milder Light, I should rather think, that, when they were prohibited, it was for those Purposes which I have lately mentioned. Because this is indeed the Spirit of that Legislation. For Instance:

*Quinetiam nefas existimatur, eam quoque uxorem ducere, quae per adoptionem Filiae Neptisve esse coeperit: in tantum, ut etsi per emancipationem Adoptio dissoluta fit, idem juris maneat*⁶.

⁶ D. 23. 2. 55. pr.

What could this be, I say, but a Guard or a Lesson? What was Adoption, that it should be so highly considered, as to operate even after its Dissolution? What, but to teach the Sacredness of the real Relation, which subsists between the natural Parent, and the Offspring? I am not sure, that the Emperor meant this, when he wrote, *Si tales personae inter se coierint, nefarias atque incestas nuptias contraxisse dicuntur. Et haec adeo vera sunt, ut quamvis per Adoptionem*⁷ —

⁷ J. 1. 10. 1.

Adoption, the Creature of Law, is said to imitate Nature, and that is all it can pretend to. Here it seems to do more. It remains an Impediment even after its own Existence. That is: The very Idea of Paternity, once raised, shall be efficacious, even when that Paternity is no more.

* Diodotus et Diogito fratres erant — Rogat [Diodotum] Diogito, suam ut filiam in matrimonium capiat. — Cum Diodotus et uxorem suam, quae fratris erat filia, simul et uxoris patrem, suum germanum et adfinem, filiorum avum et patruum ad se vocasset, ratus ob arctum hoc necessitudinis vinculum, —

If

If the Civilians and Canonists had this in view, in their Spiritual Paternity, when they prohibited the Marriage of God-father and God-daughter, it is the best thing that can be said for them.

I am the more confirmed in all this from a Passage in *Philo* *.

* De Special.
Legg. pag.
302.

Τοσαύτην ὁ ἡμέτερος νόμος ΦΥΛΑΚΗΝ ποιοῖται τῷ πράγματι, ὡς ἔδεν
προϊόντων τελευτήσαντος πατρὸς ἀγεσθαι μητρὶν ἐφῆκε, ΔΙΑ ΤΕ ΤΗΝ
ΕΙΣ Τὸν ΠΑΤΕΡΑ ΤΙΜΗΝ, καὶ διότι ΜΗΤΡΥΙΑΣ ΚΑΙ ΜΗΤΡΟΣ
ΟΝΟΜΑ ΣΥΓΓΕΝΕΣ, εἰ καὶ μὴ τὸ τῆς ψυχῆς σύνοδον [f. σύνωδον] πάθος.
Ὁ γὰρ ἀλλοτρίας ἀπέχεσθαι διδάσκει, ὅτι μητρὶα προσεῖρήθη, πολὺ
μᾶλλον ἀφέξει τῆς φύσει μητρός. Καὶ εἰ τις διὰ τὴν ἐπὶ τῷ πατρὶ μνήμην
αἰδεῖται τὴν ἐκείνη ποιεῖ γενομένην γυναῖκα, δῆλός ἐστιν ἕνεκα τῆς εἰς ἀμ-
φοτέρους τῶν γονεῶν τιμῆς, ἔδεν βλεψόμενος ἐπὶ τῇ μητρὶ νεώτερον.*

To this let me add the Reverential and Parental Names given to these Relations, and to some others : which St. *Ambrose* thought something of an Argument, when He tells us, *Ipsium nominum sonum nos revocare ab ejusmodi conjunctionibus*. Thus *Patruus*, *Avunculus*, *Amita*, *Matertera*, with the Romans : and with the Greeks, Θεῖος, Οεία, Μητρὶα, etc.

The Words of *Simplicius* † are express for my Purpose :

† Comment.
in Epictet.
C. 37.

Οἱ παλαιότεροι τοσῶτον τὰς γονέας ἐσέφθησαν, ὡς καὶ Θεὸς αὐτὰς ὀρμήσαι
καλεῖν· εὐλαβηθέντες δὲ τὴν Θεῖαν ὑπεροχὴν, τὰς τῶν γονεῶν ἀδελφές
ΘΕΙΟΥΣ ἐκάλεσαν, ἐνδεικνύμενοι τὴν τάξιν, ἣν τὰς γονέας ἔχειν πρὸς τὰς
παῖδας τὰς ἑαυτῶν ὑπελάμβανον.†

There is a Passage in *Plutarch* † which these Reflections call up, and lead me to a certain Emendation of it. *Aleuas*, the Thessalian, was much in his Uncle's Graces, and much supported by him. This directed my Author to make some Observations upon that Love and Harmony which ought to subsist between Uncle and Nephew : His Words are these :

† de Frat. A-
mor. fin.

§ Αὐτῷ γὰρ υἱὸν ἐπαχθεὶς ἴσως ἐγκωμιάζειν, ἀδελφῶ δὲ σεμνόν· καὶ ἐφίλου-
τον, ἀλλὰ φιλόκαλον καὶ ΘΕΙΟΝ ὡς ἀληθῶς. Δοκεῖ γὰρ μοι καὶ τῆνομα
[Θεῖος] καλῶς ὑφηγεῖσθαι πρὸς εὐνοίαν ΑΔΕΛΦΙΔΩΝ [not ΑΔΕΛ-
ΦΩΝ] καὶ ἀγάπῃσιν. Δεῖ δὲ καὶ τὰ τῶν κρείττονων ζηλεῖν. Ηρακλῆς τε
γὰρ

* *Nostri Lex tantam cautelam adhibuit in hoc negotio, ut ne a privigno quidem post patris obitum novercam duci permittat, tum ob patris reverentiam, tum quia novercae et matris [Graece] cognatae appellationes, licet animae affectus sint dissoni. Siquidem doctus ab aliena matre abstinere, quod noverca est dicta, multo magis a propria abstinebit. Et si quis ob patriam reverentiam eam quae quondam conjux fuerat veneretur, satis apparet, quod multo magis in honorem utriusque parentis nihil adversus matrem molietur novum.*

† *Antiquiores ita venerati sunt parentes, ut Deos appellare eos non dubitarint: divinam autem excellentiam reveriti, fratres patrum Θεῖος, i. e. divinos, appellant, ut demonstrent quam rationem parentum adversus liberos esse existiment.*

§ *Suum enim filium laudare, odiosum videtur, fratris pulchrum est: et non sui amoris adscribendum est, sed honestum est plane et divinum. Quinetiam ipsum nomen [Θεῖος, i. e. Avunculus, et Divinus] recte mihi admonere videtur, et ducere ad amorem Fratris filiorum. Etiam et imitari*

γὰρ δυνεῖν δεόντας ἐξδομήκοντα γεννήσας παῖδας, ἐδενὸς ἦτον αὐτῶν τὸν
 ΑΔΕΛΦΙΔΟΤΝ ἡγάπησεν. Ἀλλὰ καὶ νῦν πολλαχῆ σύμῳμός ἐστιν
 Ἰόλαος αὐτῷ.

(2.) My second Obligation is to shew, that Marriages in the Right Line *only* are Offences against the Law of Nature, and those in the Transverse, even the nearest, not strictly so. The strongest Case is that of Brother and Sister.

The Roman Lawyers are of this Opinion, when they tell us, that all Incest in the *Linea Transversa*, viz. out of the Line of Ascendants and Descendants, and which I call Civil Incest, was the Subject of Favour and Relaxation². Now there is no Plea for Mitigation, no Allowance for the Circumstances of Age, Sex, and Education, in Offences where the Law of Nature was violated³.

² D. 23. 2. ult.

³ Above, pag. 141.

And so are some of their Commentators also. When *Pomponius* writes⁴, *Libertinus Libertinam Matrem aut Sororem uxorem ducere non potest: quia hoc jus moribus, non legibus, introductum est*: the Words *aut Sororem* are held by the ablest Civilians to be an Interpolation of *Tribonian*. And again *Sororem* in a Law of *Scaevola*⁵. Here I have my Doubts, and they may be produced bye and bye.

⁴ D. 23. 2. 8.

⁵ D. 23. 2. 54.

As to the Marriage of Brother and Sister, if all Mankind is produced from a Conjunction of that Sort, We may safely conclude, that God in his unerring Wisdom and most perfect Holiness would not chuse a way for the Propagation of Mankind, which would contradict the Law of Nature, and cross the Rules of his own Administration. For it is infallibly true, that nothing can hallow what Nature condemns. Yes, say they, who maintain the other side of the Question, who are neither Few, nor Contemptible, if Mankind was to be propagated, and none but a Brother and Sister given for that purpose, *Necessity* demands it: *St. Austin* sets himself upon solving this Difficulty upon the same Principles:

⁶ XV. de C. D. 16.

*Quanto est antiquius, compellente necessitate, tanto postea factum est damnabilius, religione prohibente*⁶.

Now all Arguments of this sort can amount to nothing else but this shocking Conclusion, viz. that God Almighty was under a Necessity of producing Mankind from one Couple only.

⁷ pag. 108.

How the Marriage of Brother and Sister was circumstanced with the three States of Athens, Sparta, and Aegypt, We have seen above⁷, and it will be proper for my Reader to recall it to Observation upon this Occasion. The Athenians, I say, could marry with their own Sisters, not

⁸ Vit. Cimon.

Uterine, as is plain from a Passage in *Corn. Nepos*⁸.

tari decet praestantiores. Hercules enim, cum filios suscepisset duodeseptuaginta, nullo eorum parcius amavit Fratris filium. Etiamnum etenim eadem in ara cum Hercule colitur Iolaus.

Ha-

Habebat autem in matrimonio Sororem — non magis amore, quam more ductus, nam Atheniensibus licet eodem patre natas ducere.

Neque enim Cimoni fuit turpe Atheniensium summo viro, sororem germanam habere in matrimonio: quippe cum ejus cives eodem uterentur instituto¹.

¹ Idem in Praef.

Sororem suam, festivissimam omnium puellarum, quam omnes Venerem vocarent, maluit Junonem vocare. Quare, inquit, quaero enim, Sororem suam stulte studere? Athenis dimidium licet, Alexandriae totum².

² Senec. Apocolocynt.

And a great Number of Testimonies besides³. So that I really wonder, how it came to pass, that an Union, which the Laws of that Country indulged, nay perhaps encouraged, should yet be a Matter of Reproach or Objection, as I find it in some Authors of Weight and Regard:

³ See Petit. LL. Attic. Lib. 6. Tit. I. Palmer. ad loc.

Οὐχ οἱ μὲν πολλοὶ αὐτῶν ἡταιρήκασιν; οἱ δ' ΑΔΕΛΦΑΙΣ ΣΥΤΤΕΓΟ-
ΝΑΣΙ; τοῖς δ' ἐκ τῶν θυγατέρων παῖδες γεγόνασιν⁴;

σχ. Aristoph. Nub. v. 1374. Muret. Var. Lect. VIII. i. XV. 5.

But this may be said of the unlawful and meretricious Commerce. See here a stronger Instance:

Rutgerf. Var. Lect. I. 9. Philo Judaeus supra, pag. 108.

Οἱ πρόγονοι ἐξωσράκισαν Κίμωνα διὰ παρανομίαν, ὅτι τῇ ἀδελφῇ τῇ ἑαυτοῦ συνώκησε⁵.

Cyrill. I. 6. c. Julian. Montesquieu, T. I. pag. 63.

And many of the Authors, Muretus, Rutgerfius, etc. quoted in the last Note.

Indeed the Marriage of Brother and Sister has been discountenanced almost as universally as the Marriage in the Ascending and Descending Line. Plutarch acquaints us, that one Papirius a Roman, having debauched his Sister Camilla, the Father, upon hearing the News, sent his Daughter a Sword, with Instructions how to use it: and that the Son laid violent Hands upon himself. The Story of Canace and Macaneus, of Biblys and her Brother, with the fatal Catastrophes attending these unhallowed Passions, are well known to all Readers of Antiquity:

⁴ Lyfias c. Alcib. pag. 291. Edit. Lond.

Byblis in exemplo est, ut ament concessa puellae:

Byblis, Apollinei correpta cupidine fratris.

Non Soror ut Fratrem, nec qua debebat, amavit⁶.

⁵ Andoc. c. Alcib. Add Plutarch. in Cimonis vita, and again de fera Numinis vindicta. Suid. V. Κίμων, et Οξρακισμός φ. Athen. XIII. p. m. 291. Herald. I. Adversar. 12.

The Lecture, which Sotades gave one of the Kings of A Egypt, where this Practice was common (I spare, for decency sake, the Recital of the Sotadic) sufficiently justifies the Observation. Phocylides writes thus,

⁶ Ovid. IX. Met. 453.

Μηδὲ κασιγνήτης ἐς ἀπότροπον ἐλθέμεν εὐνήν §.

* Annon eorum multi muliebria passi sunt? nonnulli cum fororibus consueverint? alii ex filiis prolem susceperint?

* Majores vestri Cimonem ostracismo relegarunt, propter legum transgressionem, quia cum Sorore propria matrimonio erat conjunctus.

§ Neque in cubile Sororis abominandum inscendas.

The Story of *Cambyſes* is remarkable. He was enamoured of his Sister, and conſulted his Lawyers upon the Legality of ſuch a Match. The Gentlemen of the Profeſſion were, it ſeems, not bad Courtiers; and their Opinion had ſome Law in it, but more Adroitness. *Απεκρίνοντο ὅτι καὶ δικαία καὶ ἀσφαλέα*, ſays my Author,

Νόμον ὃδὲνα ἐξευρίσκειν, ὃς κελεύει ἀδελφεῇ συνοικεῖν ἀδελφόν· ἄλλου μὲντοι ἐξευρηκέναι νόμον, τῷ Βασιλεύοντι Περσέων ἐξεῖναι ποιεῖν τὰ αὐτῷ βέλῃται.*

* Herodot. III.

31.

Something more of the Conjunction of Brother and Sister, in the Au-

* Diodor. Sic. thors I here produce⁹.

I. 27.

Diogenes La-
ert. in Chry-
ſippo.

Justin. XVII.

2. 7.

Julian. Orat.

I. Spanheim.

ad loc.

Herodian. I.

3. 7.

Philo Jud. de

Legg. Special.

Plato de Legg.

I. VIII.

Euripid. An-

dromach. v.

175.

Minut. Fel.

Cap. 31.

D. Augustin.

de C. D. VI.

10.

Arnob. VIII.

c. Gent.

Clemens Alex.

Strom. II.

Turneb. XVII

Advers. 13.

Cujac. XVI.

Observ. 37.

Grot. de J. B.

et P. II. 5. 13.

Selden. de J.

N. et G. V. 11.

Pufendorf.

VI. 1. 34.

* Above, pag.

144.

Such Marriage therefore, though in the Infancy of Mankind it was what Nature would bear, yet when the World began to be sufficiently stocked with Inhabitants, was what Nature would by no means recommend. It is therefore a Violation of what is used to be called the Hypothetical Law of Nature¹; a Law, which did not take place at first, but was to operate, when the Circumstances of Times and of Things should give it an Edge and Execution. This Prohibition is built upon Contingency and Supposition; and disgusting as this Union may be to our Nature and Apprehensions, when We consider in *Canace* and *Macareus* (for instance) the Image of the same common Parents reflected from one to the other — a strict Unity of Blood — and the Purity of Brotherly Affection protesting against the Warmth of Conjugal Endearments: however, it does not primarily and absolutely contradict the Principles of Nature itself, so, was the Fable of *Pyrrha* and *Deucalion* to take place, and Mankind again reduced to such Circumstances, as it was in, at the beginning of Things, there would then be neither Nature, Law, nor Religion to plead against it.

O Soror, o Conjunx, — o Femina sola superstes

may then be fairly applied to his purpose: as if He should say, that nothing could justify the former Part of the Verse, except the Consideration of the latter.

And this is the common Language of all Schools and of all Systems. Prohibitions or Regulations, which Custom, Conveniency, or even Civil Institution have introduced, when found exactly to correspond with our natural Notions, and to carry with them a reasonableness that meets the Judgment, and supports our Apprehensions of Nature, are said and supposed to be the Dictates of Nature itself; though Nature does not actually prescribe them, but rather may be said to authorize and recommend them. It is upon this Principle, that many Things are said to be of Natural Law, which however strictly are not so: *Hoc jure utimur*, says *Ulpian*², (that is, We take the Liberty, or it is the prevailing Practice, warranted by

* *Negabant se ullam invenire legem, quae jubeat fratrem ducere sororem: tamen invenisse aliam legem, qua liceat regi Persarum facere quicquid libeat.*

great Reason) ut *Juris Gentium sit Acceptilatio*. Thus the Marriage of a Sister often in the Digest stands upon the same Ground, as that of a Mother. So that I am not so forward as some are, to expunge *Sororem* wherever I find it, and to send it back to *Tribonian*. As in this Law, which We have lately observed:

*Libertinus Libertinam Matrem aut Sororem ducere non potest; quia hoc Jus Moribus, non Legibus, introductum est*³. ³ D. 23. 2. 8.

And this also:

*Et nihil interest, ex justis Nuptiis Cognatio descendat, an vero non: Nam et vulgo quæsitam Sororem quis vetatur uxorem ducere*⁴. ⁴ D. 23. 2. 54.

(Where, as *Cujacius* justly observes, if it is to be discarded, it is owing to quite another Cause: For here the Tenor, the Stream of Law, § 53—55. is absolutely and intirely taken up with the Ascending and Descending Line, and *Sororem* would therefore be impertinent).

But there are Passages in the Digest, which cannot be eluded. So this,

*Item quod Leges fieri prohibent, si perpetuam causam servaturum est, cessat Obligatio, veluti si Sororem nupturam sibi aliquis stipuletur*⁵. ⁵ D. 45. 1. 35.

*Serviles quoque Cognationes in hoc jure observandae sunt. Igitur suam Matrem manumissus non ducet uxorem. Tantundem juris est et in Sorore, et Sororis filia*⁶. ⁶ D. 23. 2. 14.

(3). The third and last Thing I undertook, was to ascertain the First Degree, that could match with Decency; to shew that the Roman Civil Law has hit it exactly; and to enter a little into the Question *de Nuptiis Consobrinorum*. I here recite some of those Authors that have touched upon this Subject more particularly:

Eustathius Patricius Gr. Lat. in Jure Graeco-Rom. Marq. Freheri. Francof. 1596. Fol. p. 414—424.

Gothofredi Dissertatio de Nuptiis Consobrinorum.

Fr. Florens de Nuptiis Consobr. prohibitis aut permissis.

Alberic. Gentil. Lect. Civil. I. 11.

Brissonius de Jure Connubiorum.

Nerii Analecta, II. 32.

Contii Subseciv. Lect. II. 1.

Butler de Propinquitatē Matrimonium impediēte.

Ever. Ottonis Dissertatio de Nuptiis Consobrinorum.

D'Arnaud in Lectionibus Juris Civilis, I. 23.

If what I have laid down before be true, my Labour is at an end. There is no saying, where Nature stops, from what We have seen⁷, and ⁷ Above, pag. as 322.

MARRIAGE.

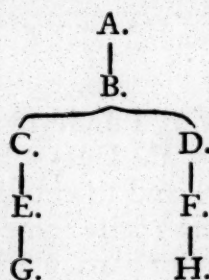
as Civil Law must take off the Impediment *somewhere*, it seems, to be nearly at that Point or Period of Relationship, when the Parental Authority is entirely extinguished, and the just Demands of Nature are satisfied; when the Unity of Blood can no longer be fairly pleaded, the Rights of Reverence cease, and the Stream of Conjugal Affection meets with no Check from the Considerations of *Real* Parentage, of *Common* Parentage, or *Representative*.

That this therefore is the proper Stage, I appeal to every Man's Apprehension. The Roman Law indeed for a Time shifted in this Point: and the Reason, why the Prohibition is yet farther extended in the Canon Law, may be owing to the fruitful and lucrative Doctrine of DISPENSATION.

To understand therefore the Difference between that last-mentioned Law and Ours, We must have recourse to the Table of Degrees, which are differently computed in the Civil and in the Canon Law. That *Computation* is necessary to be known in this particular. But I think the Doctrine of Prohibited Marriages does not depend upon the *Number* of Degrees between Party and Party; and We can do, and have done, very well without it.

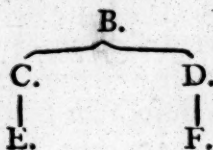
The Civil Law begins with one Party in Question, and numbers the Generations given between That Party, and the Other, whose Proximity is sought, always proceeding through the common Stock:

Thus



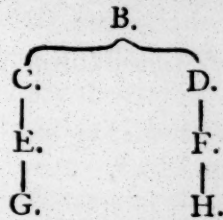
E. and F. or First-Cousins, are in the Fourth Degree; *viz.* C.+B.+D.+F. Again G, and H, or Second-Cousins, are in the Sixth Degree. And in the same manner will be found the Distance of any two Relations whatsoever, when the Common Stock, from which the two Lines are produced, shall be laid down, and the Progress of the Numeration conducted through Him.

Thus for Instance, in the Scheme before us, If I inquire for the Number of Degrees between me and my Father's Brother's Son (E. and F.), I call in the Grand-father, the common Father of those two Brothers,



But

But if I inquire for my Grand-father's Brother's Son (G. and F.) in like manner I call in the Great-Grand-father :



The Canon Law goes to work another Way, and beginning from the Common Stock, numbers the Degrees downwards on either side indifferently ; but, if the Lines are unequal, takes the longer of the two. Thus E. and F. or First-Cousins, are said to be in the Third Degree, viz. B. C. E. and G. and H. or Second-Cousins, in the Fourth Degree, viz. B. C. E. G. And upon the same Principle, if I am to inquire after my Grand-father's Brother's Son, G. and F. (my Father's First-Cousin), We are in the Fourth Degree, viz. B. C. E. G. And consequently, if I inquire for the Relation between me and that Man's Son (or my Second-Cousin), We shall be found in the same Degree also, namely, B. C. E. G. or B. D. F. H. indifferently.

The Absurdity of this Computation is manifest at first sight. For (1). What can be so ridiculous, as, in searching after the Proximity of Two Persons in Two Lines, to take only one Line into Consideration? (2). The Proximity of Two Persons, one to the other, is the Thing sought: not, how those Two Persons stand related to a Third, viz. the Common Stock. (3). And lastly, it follows from this Method of Computation, that I stand in the same Degree to my Uncle and to his Son also: to my Father's First-Cousin, and to my own Second-Cousin^s.

^s Beza de Repud. pag. 13. seqq.

By the old Canon Law, and the early Decretals, Marriages were prohibited down as far as the Seventh Degree; that is, Persons who might be by the Civil Law Computation in the Twelfth Degree to one another, were prohibited Marriage by reason of too great Proximity of Blood.

This Prohibition was reduced to the Fourth Degree^s, (at which it now stands in Countries where the Canon Law prevails) by the Fourth Council of Lateran, which was held A. 1215. And so indeed I find it in some Constitutions of Oswald Archbishop of York, in the Tenth Century.

^s Sim. van Leeuwen Cenf. For. L. 13. n. 19. Carpov. Jurisprud. Eccl. L. 2. Def. 78.

Thus then, the Civil and the Canon Law, following each its own Computation, and both extending the Prohibition to the Fourth Degree, and stopping there; it must be observed, that the Canon Law in this case acts *Inclusive*, the other *Exclusive*; i. e. the Canon Law prohibits in the Fourth Degree, which is that of Second-Cousins, and the Civil allows in the same Degree, which, according to the Civil-Law Computation, is that of First-Cousins. And this perhaps accounts for a vulgar Apprehension, very frequently maintained by the lower Class of People in this Kingdom, viz.

That First-Cousins may marry, but Second-Cousins may not.

² Levit. C. XVIII.

The Laws of England very properly agree with the Civil Law in this Instance : and Both with the Levitical². And thus stood the Practice,

Even as the Lord commanded Moses, so did the Daughters of Zelophehad.

For Mahlah, Tirzah, and Hoglah, and Milcah, and Noah, the Daughters of Zelophehad, were married unto their Father's Brother's Sons³.

³ Numb. XXXVI. 10, 11.

And so in the Case of the Patriarch Jacob⁴.

⁴ Genes. C. XXVIII. and XXIX.

With the Athenians We have seen that a Man by the Laws of his Country might marry with his Brother's Daughter : and of Consequence it cannot be disputed that his Son, who was one Remove farther, might match with that Niece of his Father, as the Father himself was not prohibited.

⁵ Quæst. Rom. 6.

To pursue this Consideration, and see how it stood in the Roman Constitution, We find this odd Account in *Plutarch*⁵,

Πρότερον ἐκ ἐγάμεν τὰς ἀφ' αἵματος, ὥσπερ ἔδὲ νῦν τιτθίδας, ἔδὲ ἀδελφὰς γαμῶσιν, ἀλλ' οὔτε συνεχώρησαν ἀνεψιαῖς συνοικεῖν ἐκ τοιαύτης αἰτίας. Ἀνὴρ χρημάτων ἐνδεής, τὰ δὲ ἄλλα χρυσὸς, καὶ παρ' ὄντιναῦν τῷ δήμῳ τῶν πολιτευομένων ἀρέσκων, ἐπὶ κληρὸν ἀνεψιὰν ἔχειν ἔδοξε, καὶ πλετεῖν ἀπ' αὐτῆς. ἐπὶ τῷ δὲ γενομένης αὐτῆς κατηγορίας, ὁ δῆμος ἀφείδων τὴν αἰτίαν ἐλέγχειν, ἔλυσε τὸ ἔγκλημα, ψηφισάμενος πᾶσιν ἐξεῖναι γαμεῖν ἀχρεῖς ἀνεψιῶν, τὰ δὲ ἀνωτέρω κεκωλύσθαι.*

⁶ XII. Annal. So Tacitus⁶, 6.

At enim nova nobis in fratrum filias conjugia, sed aliis gentibus solennia, nec lege ulla prohibita. Et Sobrinarum [meaning First Cousins or Cousin Germans] diu ignorata, tempore addito percrebuisse.

When they took place We know not. But very early, no doubt. We⁷ XLII. 34. read in *Livy*⁷,

Quum primum in aetatem veni, pater mihi uxorem fratris sui filiam dedit: quae secum nihil adtulit, praeter libertatem pudicitiamque, et cum his faecunditatem, quanta vel in diti domo satis esset. Sex filii nobis, duae filiae sunt.

This Passage, together with the general Experience of the World, might have stopt, one would think, that ungracious Remark of an Ecclesiastical Writer, viz. that such Marriages were distinguished with a remarkable Sterility.

* Antiquitus sanguine junctas Romani non copulabant sibi matrimonio, ut ne nunc quidem maternas aut sorores. Sero concessum fuit, ut ducere Consobrinas liceret, idque tali de causa. Vir quidam, pecuniae indigens, alias honestus, et gratia populari nemine inferior, consobrinam habere putabatur uxoris loco, ad quam hereditate dos magna pervenerat, eaque ratione dives ipse esse. Cui cum esset eo nomine dies dicta, populus omissa causae cognitione eum absolvit, decretoque facto nuptias consobrinarum permisit publice, conjugio autem superiorum graduum interdixit.

It is very certain that many Instances might be collected in the Roman History, besides the last-mentioned. About the age of *Augustus*, *M. Antony* married his Father's Brother's Daughter⁷. And that Emperor marries *Marcellus* his Sister's Son, to his own Daughter *Julia*⁸.
*Μάρκελλον καὶ γαμβρὸν καὶ ὡς ἀδελφιδὴν ἀγαπῶν*⁹.*

⁷ Plutarch. in Vit.

⁸ Sueton. Aug. 63.

⁹ Dion Cassius LIII. 31.

And this was the Law of the Country,

*Si Nepotem ex Filio, et Neptem ex altero Filio in potestate habeam, Nuptias inter eos me solo auctore contrahi posse Pomponius scribit, et verum est*¹.

¹ D. 23. 2. 3.

*De uno dubitari potest: Si Avus tutelam gessit Neptis ex filio emancipato natae, an nepoti ex altero filio eam collocare possit, sive emancipato, sive manenti in potestate: quia par affectionis causa suspicionem fraudis amovet? Sed etsi SCtum stricto jure contra omnes tutores nititur, attamen summae affectionis avitae intuitu, hujusmodi Nuptiae concedendae sunt*².

² l. 67. § 1. eod.

*Filiam suam heredem scripsit, et Nepotem, quem ex ea habebat, ei substituit, et ita cavuit: Lucio Titio fratris mei filio, genero meo, ducentos aureos relinquo*³.

³ D. 36. 1. 78. 8.

*Nec enim videri potest sub specie turpium nuptiarum viduitatem tibi indixisse, cum Te filio sororis suae, consobrino tuo, probabili consilio matrimonio jungere voluerit*⁴.

⁴ C. 6. 25. 2.

*Vter ex fratribus meis consobrinam nostram duxerit uxorem, ex odrante, qui non duxerit, ex quadrante heres esto*⁵.

⁵ D. 28. 7. 23.

*Qui ex fratribus meis Titiam consobrinam uxorem duxerit, ex besse heres esto: qui non duxerit, ex triente heres esto*⁶.

⁶ l. 24. eod.

Upon the whole: these Marriages are neither contrary to the Law of Nature, the Levitical Constitutions, the Civil Laws of many wise Legislatures, nor the Practice of most Ages and Countries. It has been observed, that the Parity of Age, Condition, *etc.* with which they are most commonly attended, gives them a particular Recommendation. And if We ever find them punished, it will not follow that they were Incestuous; the Punishment follows the Contempt of that Authority which thought proper to make another Disposition of Law in this Case, than what it fairly might have done.

St. *Austin* particularly sets himself against them⁷, though He confesses⁸ *XV. de C.D.* that no Law, either Human or Divine, had prohibited them down to his¹⁶ time: which yet was certainly not true.

Quia id nec Divina prohibuit, et nondum prohibuerat Lex Humana.

* *Marcellum ut sororis suae filiam, et ut generum suum diligens.*

Nor is it of any Avail to urge, that This is the next Degree to that which is interdicted. For this is an Argument which will hold against any Degree whatever, as well as this, that might have stood next the Prohibition. There must be such a Degree given, stop where you please. Besides this Argument carries the Confutation of its own Silliness along with it. For if it is *next* to a prohibited Degree, it is *not* itself a prohibited one. And, as We have seen lately³, there must be a Point, where Interdiction must break off, and that too, abruptly.

³ pag 323 and 330.

Some Writers have taken up an Objection from the Resemblance which Cousin Germans have to the Relation of Brother and Sister; from the Participation of one common Family; and from the Blood of one common Grand-father, to whom they may be considered as Children. This comes up to St. *Ambrose's* meaning⁹, *Fraternae Societatis ligantur vinculo*; to St. *Austin's* also¹, *Quod fiebat cum Conso-*
brina, pene cum Sorore fieri videbatur: quia et ipsi inter se propter tam propinquam consanguinitatem Fratres vocantur, et pene germani sunt; and² Parent. 28. to that of *Ausonius*²,

⁹ VIII. Epist. 60. Edit. Benedict.

¹ XV. de C.D. 16.

*Quae genita est mihi pene Soror:
Filia nam fuit haec Amitae,*

And is in great measure supported by the Appellations which are given them, of *Fratres* and *Sorores Patruales*, *Consobrini*, etc. Nay the Romans indeed, *Cicero* in particular more than once, did not scruple to use *Frater* simply for this Alliance, as the *Greeks* did *Κασιγγησι*. So *Soror*:

*O SOROR, o Conjunx, o Femina sola superstes,
Quam commune mihi genus, et patruelis origo,
Deinde torus junxit*¹.

³ Ovid. I. Metam. 351.

⁴ See Cujac. VI. Obf. 17.

And v. v. *Fratres Patruales* has been used for Brothers⁴.

⁵ Augustin. XV. de C.D. 16.

See Phil. de Legg. Special. pag. 303. Ed. Mang.

T. II. Plutarch. Quaest. Rom. 108.

⁶ J. I. 10. 3.

I am surprized to find a late very sensible Writer in this way of thinking. The Objection raised from taking a Wife out of the *same Family*, and thereby preventing that Disposition which Nature seems to recommend, *ad multiplicandas Affinitates*⁵, vanishes to nothing, when We consider, that the Family, which held together under one common Grand-father (I speak in the Sense of the Roman System) immediately upon his Death broke into as many, as there were Sons; who now set up for themselves, or so many *Patres Fam.*

It is argued again from the words of the Emperor⁶, *Cujus filiam uxorem ducere non licet, neque ejus neptem permittitur*. If I am not to marry my Grandfather's Daughter [my Aunt] I am not to marry her Daughter, *i.e.* my First-Cousin.

Now this Rule taken in its utmost latitude, and universally, is most notoriously false, and has been the Parent of many foul mistakes. It is not to be extended doubtless beyond that particular case, to which it is applied by the Emperor, *viz.* to a Person standing *in loco Parentis*. If I cannot marry my Brother's Daughter, neither can I marry the Daughter of that Daughter,

ter,

ter, and so on *in infinitum*, just as in the Ascending and Descending Line. But whoever applies this beyond the Case of Representative Parentage, will find himself most shamefully mistaken. And I am surprized to find that most admirable Civilian, *A. Faber*, in the number.

Another Objection is brought from some Circumstances attending that famous Text in the Institutes, on which the Doctrine of the Marriage of Cousin-Germans is in some measure grounded :

*Duorum autem Fratrum vel Sororum liberi, vel Fratris et Sororis, conjungi possunt*⁷.

⁷ J. 1. 10. 4.

For it is urged,

1. That some MSS. support the Negative Reading : *conjungi non possunt*.

2. That the Series and Connection of the Third, Fourth, and Fifth Paragraphs of this Title require that Reading also : In other words, that the Paragraph in Question can neither connect with the foregoing, nor with the following, unless We read, *conjungi non possunt*.

3. That *Caius* in his Institutes reads it negatively :

*Fratres enim Amitinos, vel Consobrinos, in matrimonium jungi nulla ratione permittitur*⁸.

⁸ Caius, Inst. I.

4. 7.

4. Lastly, that *Theophilus* in his Greek Paraphrase of *Justinian's* Institutes supports the negative Reading also, ΟΥ δύνασθαι συναπλεσθαι.

In regard to these Objections, One Answer will serve for the First, Third, and Fourth : The Second must be considered by itself.

(1). *Hotoman*, from the Authority of the *Zurich MS.* which may be great for all I know, contends for the Prohibition : As others, from a MS. of *Gudius*⁹.

⁹ See Miscell. Observ. Nov. in A. 1744. Tom. V. pag. 361.

If I was to allow this disagreement between the Text of the Institutes, and that of the Pandect¹ and Code², That Variation, nay, the Variation between the Copies of the Institutes themselves, may fairly enough be accounted for, from the Turn which the Roman Law took about this Period ; and the Fashion which obtained with the People of altering the Copies of their Elementary Books, in conformity to the prevailing Law and Practice.

² D. 23. 2. 4. ³ C. 5. 4. 19.

Theodosius the Elder, A. C. 384. prohibited the Marriage of Cousin-Germans, as is plain from his Code³; and as it is plain from *Aurelius Victor* also,

³ C. Theod. 3. 10. 1.

*Tantum pudori tribuens, et continentiae, ut Consobrinarum nuptias vetuerit tanquam Sororum*⁴.

His Son *Arcadius*, in the year 405, took off the Prohibition,

Celebrandis inter Consobrinos matrimoniis licentia legis hujus salubritate indulta est : ut revocata prisca Juris auctoritate, restinctisque calumniarum fomentis matrimonium inter Consobrinos habeatur legitimum, sive ex duobus fratribus, sive ex duabus sororibus, sive ex fratre et sorore

⁴ Sext. Aurelius Victor C. 48. Add. Paul. Diacon. 1. 12. Ambros. VIII. Epist. 60.

*sorore nati sunt ; et ex eo matrimonio editi, legitimi, et suis patribus
successores habeantur* ⁴.

⁴ C. 5. 4. 19.

And so it stood with *Justinian*, whose Text therefore is to be regulated by the Practice of that time.

⁵ Harmenop.

l. 4. tit. 6. § 22.
Attaliat. tit.
26.

⁶ Not. ad In-
stit. h. t.

Afterwards indeed they were again disapproved of ⁵, and for this reason *Theophilus*, whose Age may in some measure be settled from this Reflection, when He made his Paraphrase, shaped his Law to the Circumstances of the Time he lived in. And *Cujacius* is of this Opinion ⁶.

⁷ Above, pag.
23.

⁸ Ibid.

As for the Argument drawn from the Authority of *Caius* and his Copies, We are possessed of these two Truths, viz. (1). That the *Theodosian* Law, which put a Negative upon these Marriages, was the Law, which the Goths adhered to, when that of *Justinian* was not known ⁷. (2). That to this Disposition of Law They made every thing warp; the Institutes of *Caius* particularly were made to speak the *Theodosian* Language, and the hopeful Instrument for that Purpose was the Pen of *Anianus* ⁸.

(2). Having fairly got rid of three of these difficulties, I must pay some regard to the remaining one; and indeed it deserves it. For all that I have said must go for nothing, if the Context demands the negative Reading. But let us see how that Matter stands:

If We take, say the Objectors, the Conclusion of § 3. the Beginning of § 5. with the disputed § 4. between them, the whole runs thus:

§ 3. — *Ejus Mulieris, quam Pater Tuus adoptavit, Filiam non videris impediri uxorem ducere.*

§ 4. *Duorum autem Fratrum vel Sororum liberi, vel Fratris et Sororis conjungi non possunt.*

§ 5. *Item Amitam ducere non licet* —

The *AVTEM*, or the *Particula Adversativa* of § 4. requiring the Negative to the Affirmative Sense (so let me call it) which went before: and the Particle *ITEM* in the following Paragraph confirming and supporting it.

Now I answer that the Series and Connection of these three Paragraphs expressly require the contrary.

The Whole of the Title is thus laid out:

The Substance of the Doctrine contained in it, is comprized in these words: *A QVIBVS NVPTIIS ABSTINENDVM EST* ⁹. And that considered,

⁹ pr. h. t.
116. 2.

§ 1. — In the Ascending and Descending Line.

§ 2 — 5. In regard to Collaterals.

§ 6 — 9. To Persons joyned by Affinity.

§ 10. — considers the *Cognitiones Serviles*.

§ 11. — treats of some incidental Cases.

And the Sanction or Constitution takes up the last or 12th Paragraph.

Now it is plain that §§ 2 — 5, inclusive, contain the whole Doctrine concerning Collaterals: thus,

§ 2. Brother and Sister.

§ 3. Uncle and Niece, extended to Great Uncle, *etc.* and to other Considerations also, as that of Uncle and Niece by Adoption.

§ 4. Proceeds to the next Degree after Uncle and Niece; *viz.* to First-Cousins. Omitting therefore the Random of the former Paragraph, This connects not with the *End*, but the *Beginning* of it, thus:

§ 3. *Fratris vel Sororis Filiam Vxorem ducere non licet* —

§ 4. *Duorum autem Fratrum vel Sororum liberi, vel Fratris et Sororis, conjungi possunt.*

After this Case of Cousin-Germans, which stands as an Exception, and may therefore be fairly reduced to a Parenthesis, the Emperor proceeds in prohibited Collaterals, connecting still with the Beginning of § 3. thus:

§ 3. *Fratris vel Sororis Filiam Vxorem ducere non licet* —

(§ 4. *Duorum autem Fratrum vel Sororum liberi, vel Fratris et Sororis, conjungi possunt.*)

§ 5. *Item Amitam — ducere uxorem non licet* —

This, I say, is the Stream and Disposition of the whole Title: the Connection regular, and the Series of Relationship well attended to.

But how absurd would it be for a Legislator to use this Language, *viz.*

THOUGH *there lies no Impediment against your marrying your Niece by Adoption: YET there lies one against the Marriage of Brothers and Sisters Children?*

Which two Cases have no Relation, no Respect, no Coherence, the One with the Other. The Cases of Adoption throughout this Title are so many Πάρεργα: and the great Lines are drawn, when divested of those Cases, in the manner in which I flatter myself that I have preserved them.

Much Stress has been laid upon this Objection, which called from me therefore a greater degree of Attention.

Upon the Whole, this View of Consanguinity, and the Foundation upon which I have raised the Theory of Incestuous Marriages, seems far preferable to any other, that has been produced. The Computation of Degrees is not safe, without Limitations and Exceptions. For Instance, If the Rule be, that Marriage is lawful, in the Civil Law, in the Fourth Degree, it must be with a Proviso, *that the One be not to the Other in loco Parentis*. For my Brother's Grand-daughter is to me in the Fourth Degree, yet a Marriage there would not be lawful. Indeed the Computation of Degrees has a place in the Roman Law-Books, principally upon the account of Causes Testamentary: and the elder Lawyers but rarely applied it to the consideration of Matrimony. Whereas This is a Key

which opens all Locks, and does the Business substantially, clearly and universally.

A Word or two concerning that Incest, which is contracted by Affinity, and I have done.

¹ Above, pag.
315.

From the Principle, upon which Affinity is grounded ¹, it follows, that when two Families are connected together by a Marriage-Contract, (which is the Nature and Substance of Affinity) No body is concerned in this Dispute on one whole side, but the Contracting Party himself. For He alone does *accedere ad finem alterius Cognationis*; and none of this Family but him are properly *Affines*. For Instance: If A. marries into the Family of B. there are several in the Family of B. whom A. himself, supposed now at liberty, could not contract with; but none other of the Family or Blood of A. would be affected. For the Brother of A. might marry the Sister of B. (though there be a seeming Relationship knit between them by the Marriage of A. and B.) the Father of A. might marry the Mother of B. or the Sister of B.; that is, in other words, the Father may marry the Mother, and the Son the Daughter; or Father and Son may marry two Sisters. Nay, farther, the Son may marry the Mother, and the Father, the Daughter. In short, any of the Line, the Blood or Cognation of A. indifferently, may match with any of the Line, the Blood or Cognation of B. indifferently, except the Person of A. himself. And so *v. v.* with regard to B.

This Consideration cuts the Matter short. For now as no body can be concerned, but the Contracting Party, on either hand, so, in regard to Him, or Her, if We consider the Man and Wife one Flesh (which We are directed to do by the greatest Authority) it is only conceiving the One in the Place of the Other, and then We call in all the Rules of Consanguinity, and give them an application here also: And *Quocunque gradu quis uni conjugum junctus est* Consanguinitate, *eodem gradu junctus est alteri* Affinitate.

Thus I cannot marry my Wife's Daughter, nor my Wife's Mother: because that Daughter and that Mother are to my (former) Wife in the
² *Iliad. l. 172.* Ascending and Descending Line of *Affinity*. Thus *Helen* in *Homer* ² addresses herself to the Father of her Husband, in Terms, which She might use to her own:

Αἰδοῖός τέ μοι ἐσσί, φίλε ἐκურῆ, δεινός τε.

And be it observed as to the Contracting Party, that though the Canon Law allows that to be Affinity, which is cemented by the intervention of *two or more* Marriages, (as, for instance, between, Me, and the second Wife of my Wife's Father; between Me, and the Wife of my Wife's Brother) yet no Prohibition lies beyond that Affinity, which is contracted by the means of one Marriage only.

* *Reverendus es mihi, dilecte Socer, timendusque.*

Thus, though a Man may not marry his Brother's Widow (for here the Woman by contracting with one Brother, becomes one Flesh with him, and is, in consequence, to the other Brother, *in loco Sororis*, or a real Affinity-Sister) yet it has been adjudged, and with great reason, that I can marry the Widow of my (former) Wife's Brother, because my Affinity with Her was created by the Interposition of a *double* Marriage: And yet by my Marriage with my (former) Wife, I am to this Woman's (first) Husband *in loco Fratris*.

To recapitulate therefore, and to sum up all that is necessary to guide us upon this Head,

1. There is no Affinity, properly so called, or sufficient to bar Marriage, between the *Consanguinei* or *Cognati* of the Contracting Parties, on the one side, and on the other, out of the Persons Contracting.

2. The Person who creates the Affinity, is properly the Person in Question, and all Difficulties in regard to him are to be solved, by regarding his Wife's Relations in the same Degree to Him as to his Wife.

3. The same Person is not affected, when Affinity is grounded upon Affinity.

Having lately⁵ had occasion to mention the Unity which subsists between Husband and Wife (*Et erunt hi duo in carne una*), it will not be improper here to subjoin a Word or two about POLYGAMY; and indeed this Third Head, in which I am engaged, *viz.* a Discourse upon the Marriage-Contract, is the most proper Place to receive it.

Polygamy is either *Successiva* or *Simultanea*: Of the former, which means no more than a second Marriage, We have observed something already⁶, and found it to be, by the Law of Nature, not restrained; by the Civil Law of the Romans, rather encouraged than discountenanced. The *Polygamia Simultanea* therefore, *viz.* the Circumstance of One Husband having several Wives, or One Wife several Husbands, remains to be considered.

The latter of these two, Πολυανδρία, was never thought of, or put in practice, by the most barbarous Nations of Antiquity⁷, many of which however indulged in the other sort of Polygamy, and allowed an unlimited number of Wives. Thus St. *Austin* writes⁸, when He is defending or palliating the Polygamy of the Patriarchs:

Sufficiendae prolis causa erat Vxorum plurium simul uni viro habendarum inculpabilis consuetudo; et ideo unam feminam maritos haberes plurimos honestum non erat. Non enim Mulier eo est foecundior, sed meretricia potius turpitudine est, vel quæstum, vel liberos vulgo quaerere.

And yet this Plurality of Husbands, if We may credit some Travellers, is not unknown to some of the Moderns⁹.

⁵ Above, pag. 338.

⁶ Above, pag. 295. seqq.

⁷ Above, pag. 142.

⁸ III. de Doctr. Christian. 20.

⁹ Montesqu. Vol. I. pag. 361, 362.

A Plurality of Wives is a Question, that has been debated on both sides with some warmth. It has always been opposed by the best Friends to Christianity, which was always unfavourable to this Practice. See a good deal brought together in a small Compass by *Hoppius*⁹ and *Gothofred*¹.

⁹ Comment.
ad Instit. Lib.
I. Tit. X.
¹ ad C. 1. 9. 7.

It is endless to go into all the Disputes upon this Head; to examine what Natural Reason has to say for it, or against it; to enquire how the Scene may shift in different Climates and Temperatures; how the Question may be affected by Calculations, and how much may depend upon the Proportion (which is said to vary in different parts of the world) of Males to Females; and lastly, how it comes to stand so openly condemned under the Dispensation of the New Law²; and yet to be so far indulged (at least) as to admit of Laws and Regulations for the Direction of it, in the Old³.

² 1 Cor. VII.
2.
³ Deut. XXI.
15—17.

This would carry me too far; and these Points moreover have all of them been so fully considered by those, who have gone before me, that I should despair of saying or observing any thing that has escaped them. I shall therefore confine myself to one Point only, and endeavour to search how it stood with the Institutions and Establishments of Antiquity.

With the Barbarian States (I speak now in the Greek Idiom, and mean by the Expression, such as were not Greeks) the Custom of having a multitude of Wives was common. So the Inhabitants of *Trapoban* and others, whom *Pufendorf* has recited⁴. The same has been observed of the ancient Britons, our Forefathers, according to *Caesar*⁵; which yet is not the Polygamy We are concerned about, or like that of the modern Asiatics, but rather is to be understood of a thing totally different, what I call a *Community* of Wives, which amounts to a mixture of both Species of Polygamy together, where many Men had many Wives, and many Women many Husbands.

⁴ VI. 1. 15.
⁵ V. Bell. Gall.
14.

Vxores habent deni duodenique inter se communes: et maxime Fratres cum Fratribus, Parentesque cum Liberis: sed si qui sunt ex his nati, eorum habentur liberi, quo primum Virgo quaeque deducta est.

Such is that Instance of the ancient Inhabitants of *Tuscany*, recorded by *Theopompus* in an Account which is preserved in *Athenaeus*⁶; an Account not very favourable throughout, or advantageous, to the Memory of that People.

⁶ XII. 3.

Νόμον εἶναι φησὶ παρὰ τοῖς Τυρρῆνοις, ΚΟΙΝΑΣ ΤΗΑΡΧΕΙΝ ΤΑΣ ΓΥΝΑΙΚΑΣ ——— τρέφειν δὲ τὰς Τυρρηνὰς πάντῃ τὰ γινόμενα παῖδιά, ἐκ εἰδότης, ὅτε παῖδός ἐστιν ἑκάστου*.

I find the Athenians at one time gave into Polygamy, when they thought the Diminution of their Inhabitants would justify the Practice.

* *Legem esse apud Tyrrenos, Communes ut sint mulieres — alere autem eos omnes qui nascuntur infantes, ignaros, quis singulorum Pater sit.*

Συγχε-

Συγκεχωρημένον κατὰ ψήφισμα τῷτο ἐγένετο τότε διὰ σπάνιν ἀνθρώπων, ὥς
ἐξεῖναι καὶ ΔΥΟ ἔχειν ΓΥΝΑΙΚΑΣ τὸν βελλόμενον⁷.*

⁷ Aristot. de
Nobilit. apud
Athen. l. 13.
init.

Though upon a fair Consideration of Circumstances, I cannot think, that Polygamy was here indulged in all its Form. It amounted to no more than Concubinage, which I have more than once observed, was very near it in Substance.

It was doubtless this Decree, that *Euripides* availed himself of.

Euripides — mulieres fere omnes in majorem modum exosus fuisse dicitur : sive quod natura abhorruit a mulierum coetu, sive quod duas simul uxores habuerat, cum id decreto ab Atheniensibus facto jus esset quarum matrimonii pertaecebat⁸.

⁸ Gell. XV.
20.

It is remarkable, that this little History of *Euripides* exactly suits with the Sentiments, and with the way of Arguing also, which He has given to one of his Characters in his Tragedy of *Ino*, now almost all lost :

Νόμοι γυναικῶν ἔ καλῶς κεῖνται πέρα.
Χρὴν γὰρ τὸν εὐτυχῆνθ' ὅτι πλείστας ἔχειν
Γυναῖκας, εἴπερ ἂν τροφὴ δόμοις παρῇ.
Ὡς τὴν κακὴν μὲν ἐξεβαλλε δωμάτων,
τὴν δ' ἔσαν ἐσθλὴν ἠδ' ὥς ἐσώζετο.
Νῦν δ' εἰς μίαν βλέπεσι κίνδυνον μέγαν
ρίπτοντες, ἔ γὰρ τῶν πρόπων πειρώμενοι
Νύμφας ἐς οἴκους ἐρματίζονται βροτοί. §

A very comfortable Doctrine for the Fair Sex truly !

It was owing to this Decree also, that *Socrates* was said by many Writers (though it is disputed by others) to have had two Wives at the same time : and their names moreover are upon Record⁹. Why it should be disputed, those knew best, who disputed it. But this We know at least, that, if this Polygamy was ever licenced by the Laws of that State, a Number or Community of Wives was not at all contradicted by the Genius of that School.

* Id tunc temporis plebiscito erat indultum propter hominum infrequentiam, ut cuiuslibet liberet duas uxores habere.

§ Haud scripta recte jura sunt connubiis.
Decuit beatum pluribus se uxoribus
Sociare, quantas alere sufficeret domus :
Vt inaudientem pelleret penatibus,
Bonam volenti corde servaret sibi.
Nunc una sola accipitur, immenso nimis
Vitae periculo : nam priusquam intrat domum
Nova nupta, nulla moris exploratio est.

Λέγεσθαι δὲ ὡς καὶ νόμον ἔθετο [Cavares R. Pers] κοινὰ τοῖς ἀνδράσι προ-
κεῖσθαι τὰ γυναῖκα, ἢ κατὰ τὸν Σωκράτους, οἶμαι, καὶ Πλάτωνος, λόγον,
καὶ τὴν ἐν τῷ λόγῳ κεκρυμμένην ὠφέλειαν, ἀλλ' ὥς τῷ προσυχνόντι
ἐξεῖναι πρὸς ἣν αὖν ἐθέλοι χωρεῖν, καὶ τῆς εὐνῆς μεγαλαυχάνειν εἰ καὶ ἑτέρα
τῷ συνοικῆσαι καὶ ἀποκεκριμένη ἐτύγχανε.*

* Agath. Hist.
1. 4.

What that *hidden Utility* was, which *Agathias* alludes to, may be a matter of Speculation. But the Arguments of *Plato* for this Measure, may be seen, such as they are, in the fifth Book of his Work *de Rep.* Much may be learned upon this Platonic Principle from those Writers², whom *Fabricius* has produced in his excellent Edition of *Sextus Empiricus*, upon this Passage³,

² Cotelierius,
Bessarion, Pet.
Mosellanus,
Livius Galans.

³ III. Pyrrhon.
Hypotypof.
24.

Πλάτων δὲ καθολικώτερον κοινὰς εἶναι τὰς γυναῖκας δεῖν ἀπεφύνατο.†

We find this always a great Matter of Dispute and Controversy among the Ancients :

*Secunda Quaestio fuit, quonam modo audiri atque accipi deberet, quod Plato in Civitate, quam in libris suis condidit, κοινὰς τὰς γυναῖκας esse censuit*⁴.

⁴ Gell. XVIII.
2.

⁵ § 2—4.

This Subject is well handled, and the reasons of *Plato* considered by *Aristotle* in his second Book of *Politics*⁵, a Work, which I will venture to pronounce one of the most Sterling Productions of Antiquity, and a most inexhaustible Treasure for the Statesman, the Lawyer, and the Philosopher.

⁶ Above, pag.
66, 67.

The polite States of Greece were so far from being convinced by the arguments of *Plato*, whom they never held very high in his Legislative Capacity⁶, that they commonly looked upon Polygamy, as a Barbarian Practice, and not fit for the Refinements of a better Taste, the Genius of their several Constitutions, and the Credit of their Philosophy. There is a remarkable Passage in *Athenaeus*, which shews in some degree how this Custom, while it thwarted the Mode of the Grecian Polity, struck in with the Despotic Complexion of the Eastern and Asiatic Government. I shall transcribe the whole :

§ Παρὰ δὲ Πέρσαις ἀνέχεσθαι ἡ βασιλεία τῷ πλήθει τῶν παλλακίδων, διὰ τὸ ὡς δεσπότην ἄρχειν τῆς γαμετῆς τὸν βασιλέα. ἔτι δὲ καὶ διὰ τὸ τὴν βασιλίδαν, ὡς φησι Δίνων ἐν τοῖς Περσικοῖς, ὑπὸ τῶν παλλακίδων θρησκεύεσθαι.

* Dicitur vero etiam legem tulisse, qua feminae viris communes prostituerentur, non ex Socratis, arbitror, et Platonis instituto, aut utilitatis in ea reconditae respectu, sed ut cuiusvis liceret cum qua liberet, rem habere, etiamsi alteri alicui nupta esset, eique addicta conviveret.

† Plato autem etiam generalius communes esse uxores debere pronuntiavit.

§ Apud Persas Regina multas pellices tolerat, tum quia Rex uxori, velut dominus, imperat, tum etiam, quia reginam, ut ait Dino in Persicis, venerantur, colunt, atque etiam adorant pellices. Priamus feminis multis utitur : aegre non fert Hecuba. Si ergo Priamus loquitur :
Novem-

σκεύεσθαι· προσκυνῶσι γυν αὐτήν. Καὶ ὁ Πρίαμος δὲ πολλὰς χρεῖται
γυναῖξιν, καὶ ἡ Ἑκάβη δὲ δυσχεραίνει. Λέγει γυν ὁ Πρίαμος,

Εννέα καὶ δέκα μὲν μοι ἱὲς ἐκ νηδύος ἦσαν,
Τὲς δ' ἄλλες μοι ἔτικτον ἐν μεσάρῳσι γυναῖκες,

Παρά δὲ τοῖς Ἕλλησιν οὐκ ἀνέχεσθαι ἡ τῇ Φοίνικος μήτηρ τὴν τῷ Ἀμύντορος
παλλακίδα. Μήδεια δὲ, καίπερ εἰδυῖα τὸ ἔθος, ΟΤΙ ΕΣΤΙ ΒΑΡΒΑ-
ΡΙΚΟΝ, καὶ φέρει καὶ αὐτὴ τὸν Γλαύκης γάμον, ἥδη εἰς τὰ ΑΜΕΙΝΩ
ΚΑΙ ΕΛΛΗΝΙΚΑ ἐκδοδημένη. Καὶ ἡ Κλυταιμνήστρα δὲ περιπαθὴς
γενομένη τὴν Κασάνδραν σὺν αὐτῷ Ἀγαμέμνονι ἀποκτείνει, ἣν εἰς τὴν
Ελλάδα ὁ κρείων ἐπηγάγετο, ΕΝ ΘΕΙ ΓΕΝΟΜΕΝΟΣ ΒΑΡΒΑΡΙΚΩΝ
ΓΑΜΩΝ.⁶

⁶Athen. l. 13.
init.

I am persuaded, it would not be a fruitless or idle Speculation to
pursue this Hint, and to inquire how this Matter constantly stood in
relation to that Agreement which We generally find subsisting be-
tween Civil and Domestic Government.

Thus *Hermione* in *Euripides*⁷ is made to express herself in the Purity
of the Grecian Sentiment :

⁷Andromach.
v. 177.

Α μὴ παρ' ἡμᾶς εἴσφερ'· καὶ γὰρ καλὸν,
Δυσὶν γυναικοῖν ἀνδρ' ἐν ἡνίας ἔχειν·
Αλλ' εἰς μίαν βρέποντες εὐναίαν Κύπριν,
Στέργασιν, ὅσως μὴ κακῶς οἰκεῖν θέλει.†

So *Orestes*⁸,

⁸Ibid. v. 909.

Κακὸν γ' ἔλεξας, ἐν' ἀνδρὰ δις· ἔχειν λέχη.‡

And the Chorus of Grecian Women⁹,

⁹Ibid. v. 464.

§ Οὐδὲ ποτ' αἶν δίδυμα
Λέκτρ' ἐπαινέσω βροτῶν,
Οὐδ' ἀμφιμάτορας κόρες,

Εἰς

*Novemdecim prodierunt ex utero mihi tuo liberi,
Alios mihi pepererunt in palatio feminae.*

*Apud Graecos Phoenice mater Amyntoris pellicem non patitur. Medea, tametsi mos ille non
ignotus esset, utpote receptus a Barbaris, ob Glaucis nuptias excandescit, ut quae jam Graecis
legibus et humanioribus assuevisset. Clytaemnestra perturbatione commotioneque animi in trans-
versum acta Agamemnonem interficit simul cum Cassandra, quam princeps barbarico more nu-
ptiarum jam imbutus, in Graeciam duxerat.*

† Quae ne apud nos introducas : non enim est honestum
Unum virum habere habenas duarum mulierum.
Sed intuens in unam lecti sociam Venerem,
Est contentus, quicumque non vult male habitare.

‡ Malum dixisti, unum virum habere duas conjuges.

§ Nunquam geminos
Lectos laudabo mortalium,
Neque liberos, qui habent diversas matres,

Item

Εἰν μὲν οἴκων,
 Δυσμενεῖς τε λύπας.
 Τὴν μίαν μοι σεργέτω πόσις γάμοις
 Ακοινώνητον εὐνὰν ἀνδρός.

But it must not be understood, as if this was the universal Practice of all the uncivilized Nations : One Nation, at least, in the Western Part of the World stood clear of it :

*Severa illic Matrimonia, nec ullam morum partem magis laudaveris. Nam prope soli Barbarorum singulis uxoribus contenti sunt, exceptis admodum paucis, qui non libidine, sed ob nobilitatem, plurimis nuptiis ambiuntur*¹.

¹ Tacit. de mor. Germ. c. 18.

In the Roman Constitution, and indeed wherever Concubinage prevailed, whatever their Professions might be, the Practice did not differ much from Polygamy :

*Parvi autem refert, Vxori, an Concubinae quis leget. — Sane enim, nisi dignitate, nihil interest*².

² D. 32. 49. 4.

³ Quaest. in Genes. lib. 1. quaest. 90.

Much to the same purpose are the Words of St. *Austin*³,

Non facile dignoscitur, quas Concubinas appellet Scriptura, quas Vxo- res; quandoquidem et Agar dicta est Vxor, quae postea dicitur Concubina, et Cethura, et ancillae, quas dederunt Rachel et Lia viro suo. Nisi forte omnis Concubina Vxor, non autem omnis Vxor Concubina, more loquendi Scripturarum appellatur, id est, ut Sara, et Rebecca, et Lia, et Rachel Concubinae dici non possint; Agar vero, et Cethura, et Balla, et Relfa, et Vxores et Concubinae.

⁴ D. 45. 1. 121. 3. C. 5. 26. unic. et Gothofred. ad loc. C. 7. 15. ult. fin. Jul. Paul. Recept. Sentent. II. 20.

It is said indeed, that by the Roman Law a Man might not have a Concubine, *durante matrimonio*⁴, nor indeed Two Concubines *extra matrimonium*⁵. So then, contrary to what I just now laid down, the Romans guarded against even the very Appearance and Approach of Polygamy, in the Person of the Concubine, or Secondary Wife. But be it observed, that the Laws, which laid this Restraint, seem to be late in point of time⁶, and sufficiently shew what the Practice had been, at least, down to that Period.

⁵ Above, pag. 273.

⁶ Heinecc. ad L. Jul. et Pap. Popp. II. 4. D. 25. 2 11. fin.

⁷ in Jul. § 52.

That *Julius* had a design of establishing Polygamy by Law, may seem to be plain (and to some has seemed so) from *Suetonius*⁷,

Helvius Cinna Trib. pl. plerisque confessus est, habuisse se scriptam paratamque legem, quam Caesar ferre jussisset, uti uxores, liberorum quaerendorum causa, quas et quot vellet, ducere liceret.

*Litem aedium
 Et tristes dolores.
 Maritus in nuptiis mihi sit contentus uno
 Lecto viri non communicato.*

Yet

Yet is that Passage not so to be understood, but to relate to the Particular of *Julius* alone, and meant as a Compliment to Him, a personal Privilege or Exemption :

Αμέλει κ' γυναιξίν, ὅσαις ἂν θελήσῃ, ΣΥΝΕΙΝΑΙ ΟΙ ΕΤΟΛΜΗΣΑΝ ΤΙΝΕΣ ΕΠΙ-
τρέψαι, ὅτι πολλαῖς κ' τότε ἔτι, καί περ πεινηκοντέτης ὥν, ἐχρῆτο⁸.*

⁸ Dio Cassius
XLIV. 7.

I take it for granted, that both these Passages relate to the same Event: and then the One explains the Other.

The Case of *Antony* has been brought, as a full Instance of Polygamy. But his Gallantries are not to be quoted as the Laws of his Country. And indeed upon the Overture of a Match with the Sister of *Octavius*, the Words of *Plutarch* are,

Εδόκει δὲ κ' Φιλίππου ἀποικομένης χηρεύειν Ἀντώνιος, ἔχειν μὲν ἐκ ἀρρέμενος
Κλεοπάτραν, ΓΑΜΩΙ ΔΕ, ΟΥΧ ΟΜΟΛΟΓΩΝ⁹.†

⁹ Vit. Anton.

So again¹,

¹ Ibid.

Οκταβίαν μὲν γὰρ πραγμάτων ἕνεκα διὰ τὸν ἀδελφὸν συνελθεῖν, κ' τὸ τῆς
ΓΑΜΕΤΗΣ ὄνομα καρπῆσθαι. Κλεοπάτραν δὲ, τοσούτων ἀνθρώπων βα-
σιλεύσαν ΕΡΩΜΕΝΗΝ Ἀλιωνίᾳ καλεῖσθαι, κ' τῆνομα τῆτο μὴ φεύγειν
μηδ' ἀπαξίεν.‡

And yet *Plutarch* himself has given occasion to this mistake :

Ετι Δημήτριος μὲν ἐ κεκωλυμένος, ἀλλ' ἀπὸ Φιλίππου κ' Ἀλεξάνδρου γε-
γονώς, ἐν ἔθει τοῖς Μακεδόνων βασιλεῦσι, ΕΓΑΜΕΙ ΓΑΜΟΥΣ ΠΛΕΙΟ-
ΝΑΣ, ὥσπερ Λυσίμαχος κ' Πτολεμαῖος. — Ἀντώνιος δὲ ΠΡΩΤΟΝ
μὲν ΟΜΟΥ ΔΥΟ ΓΥΝΑΙΚΑΣ ΗΓΑΓΕΤΟ, ΠΡΑΓΜΑ ΜΗΔΕΝΙ
ΡΩΜΑΙΩΝ ΤΕΤΟΛΜΗΜΕΝΟΝ².§

² Compar.
Demetr. et
Anton.

I find Polygamy condemned by this People, all down the Republic. There is a remarkable Passage in *Tully*³.

³ I. de Orat.
⁴⁰.

*Quid, quod usu, memoria Patrum, venit, ut P. fam., qui ex Hispania
Romam venisset, cum uxorem praegnantem in Provincia reliquisset,
Romaëque alteram duxisset, neque nuncium priori remisisset, mortuus-
que esset intestato; et ex utraque filius natus esset; mediocrisne res in
controversiam adducta est? cum quaereretur de duobus civium capiti-
bus; et de puero, qui ex posteriore natus erat; et de ejus matre, quae,
si judicaretur, certis quibusdam verbis, non novis nuptiis, fieri cum
superiore divortium, in concubinae locum duceretur.*

* Quippe inventi sunt, qui auderent potestatem ipsi cum quocunque vellet feminis rem habendi facere: nam pluribus etiam tum, quinquagenario major, utebatur.

† Habebatur autem excessu Fulviae torus Antonii vacare. Non dissimulabat hic quidem habere se Cleopatram; in matrimonio inficiabatur tamen.

‡ Octaviam, rebus posulantibus, fratris gratia junctam ei fuisse, et nomine frui uxoris; Cleopatram vero, tam multorum reginam mortalium, pellicem Antonii nominari, neque eam hoc defugere vel dedignari nomen.

§ Adhuc non lege vetante Demetrius, sed more a Philippo et Alexandro inter reges Macedonum usurpato, plures, sicut Lysimachus et Ptolemacus, duxit uxores: Antonius, primum, quod erat apud Romanos inauditum, duas simul accepit uxores.

Moreover, so cautious and delicate were They in this respect, that *bina Sponsalia* were as illegal, as *binæ Nuptiæ*: As appears from the ³D. 3. 2. 1. fin. Praetor's Edict²,

INFAMIA NOTATVR ——— QVIVE SVO NOMINE, NON
IVSSV EIVS, IN CIVIS POTESTATE ESSET, EIVSVE
NOMINE, QVEM QVAMVE IN POTESTATE HABERET,
BINA SPONSALIA BINASVE NVPTIAS IN EODEM TEM-
PORE CONSTITVTAS HABVERIT.

We gather, that it was illegal, at the time of enacting the *Lex Aelia Sentia*, about the Age of *Augustus*. For *Paulus* in his Commentary upon that Law, writes,

³D. 40. 2. 15. *Si Duo matrimonii causa manumittent, recipi, causa non debet³.*

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So it stood under *Domitian*. The following Inscription shews sufficiently, what *was* expected from a Subject of the Roman Constitution, and what *might be* apprehended from a Member of a Foreign Condition :

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MVS TRIBVNIC. POTESTAT. XII. IMP. XXII. COS. XVI.
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RTE III. ALPINORVM ET IN VIII. VOLVNTARIORVM
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NIS PROBATI ERANT ET SVNT IN DELMATIA SVB Q. PON-
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TAS IIS DATA AVT SI QVI COELIBES ESSENT CVM
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SINGVLI SINGVLAS⁴.

⁴ Gruter.
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Thus A. C. 259. the Emperors *Valerian* and *Gallienus*,

Eum, qui duas simul habuit uxores, sine dubitatione comitatur Infamia.
In ea namque re non furis effectus, quos cives nostri matrimonia con-
trahere plura prohibentur, sed animi destinatio cogitatur⁵.

⁵ C. 9. 9. 18.

Afterwards the Emperors *Dioclesian* and *Maximian* enforce the same Law, and refer us to the Praetor's Edict, lately mentioned :

Neminem, qui sub ditione sit Romani nominis, binas uxores habere posse,
vulgo patet : cum etiam in Edicto Praetoris huiusmodi viri infamia
notati sunt. Quam rem competens iudex inultam esse non patietur⁶.

⁶ C. 5. 5. 2.

And

And to speak therefore to the Punishment, which the Emperors in the last Words of this Law allude to, it appears from many Instances, that the Offence was Capital.

Κεφαλὴ δὲ ὄρεται τιμωρία κατὰ τῶν διπλῶν γάμον συνιστώντων⁷.*

⁷ Theophil. Instit. l. 10. 6

For as the second Wife is not really and lawfully a Wife in the Roman Law, such a Commerce is looked upon as *Stuprum* at least, if not *Adulterium*, and therefore punishable in that Contemplation. See the Notes upon *Theophilus*⁸.

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This Conclusion, viz. that Bigamy was Capital with the Romans, is thus supported also :

*Vxor, quae in militiam profecto marito, post interventum annorum quatuor, nullum sospitatis ejus potuit habere indicium, atque ideo de nuptiis aliis cogitavit, nec tamen ante nupsit, quam libello Ducem super voto convenit; non videtur nuptias iniisse furtivas, nec dotis amissionem sustinere, nec capitali poenae esse obnoxia*⁹.

⁹ C. 5. 17. 7.

But in the same Century, it is said, The first *Valentinian* was so hardy, as to establish Polygamy by Law, in order to indulge a favourite passion. And this is supported by a great cloud of Witnesses, *Socrates*¹, *Nicephorus*², *P. Diaconus*³, *Jornandes*⁴. Let me recite the Story from one of them :

¹ IV. Eccl. Hist. 31.
² II. Eccl. Hist. 33.

*Valentinianus Senior dudum laudante Severa uxore sua pulchritudinem Justiniae, sibi eam sociavit in matrimonio, legesque propter illam concessit, ut omnes viri qui voluissent, impune bina matrimonia susciperent, quia ideo populosa Parthorum Gens est, quia hoc apud eos solenne est, et multarum uxorum unus auditur maritus*⁵.

³ Lib. XI. Append. ad Eutrop.
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But some are willing to dispute the Truth of the Tradition: chiefly, because *Ammianus Marcellinus* takes no notice of it.

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I am apt to think it true, and that the Jews, who were fond of the Practice, availed themselves of the Emperor's Indulgence: for towards the end of the same Century, We find this Constitution of the Emperors *Theodosius*, *Arcadius* and *Honorius*, levelled at that People.

*Nemo Judaeorum morem suum in Conjunctionibus retineat, nec juxta legem suam nuptias sortiatur, nec in diversa sub uno tempore conjugia conveniat*⁶.

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But if it was ever established by *Valentinian*, it lasted not long. For *Justinian* refers to the contrary practice, as to the known and settled Rule of his Country :

Ὡςπερ γὰρ εἴτις νομίμῳ συνοικοίῃ γυναικὶ, ἄλλας ἐπεισάγειν ἢ ἃν δύναιτο, τῇ συνοικεσίᾳ συνεσῶτος, ἔτις⁷.†——

⁷ Nov. 18. 5. et 89. 12. 5.

And in like manner is Polygamy condemned in his Institutes⁸.

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MARRIAGE.

IV.

My Fourth and last Head was the Dissolution of Matrimony. My Reader will apprehend that I mean not the Natural, but the Legal Dissolution of it, otherwise called DIVORCE.

I would not be understood, as if I declined the consideration of the *Natural* Dissolution by Death, because I would not encounter a difficulty. For there have been some, who have maintained that the Conjugal Union is not actually *dissolved* by the death of one Party, but interrupted only. Upon this goodly principle has been raised the once-favourite Doctrine of *Monogamia*; as if the Party deceased had their Right violated by the fresh Contract which the Survivor thought proper to enter into.

Id cinerem aut manes credis curare sepultos !

As if it could be imagined, that this Interruption hereafter should be done away, and the first Contract renewed in its full Vigor, according to the Fancy of these pretty Hendecasyllables, which I once met with, and take this occasion to introduce, as I apprehend they are not very commonly known.

*Occidit mea chara Pancharilla :
Occidit mea Lux, meumque Sidus ;
Et nunc per vacuas domos Silentium
Comes pallidulis vagatur umbris.
Sed charam sequar ; arboresque ut alta
Sub tellure suos agunt amores,
Et radicibus implicantur imis :
Sic nos consociabimur sepulti,
Et vivis erimus beatiores.*

But having spoken to this point in my Reflections upon Second Marriages, I proceed to what now lies before me. Upon the Subject therefore of Divorce may be consulted

*D. Lib. XXIV. Tit. 2.
C. Lib. V. Tit. 17. et 24.
N. XXII. et CXVII.
Caus. 28. Quaest. 1, et 2.
Grotius II. 5. 9.
Pufendorf. VI. I. 21, — 24.
J. Selden. Vxor Hebraica.
Beza de Repudio et Divortio.
Hieron. Zanchius de Divortiis.
Edm. Bunny of Divorce for Adultery.*

Before

Before we enter upon this Particular, it is proper to premise,

1. That the Ancients meant two different things by *Repudium* and *Divortium*.

*Divortium inter Virum et Vxorem fieri dicitur: Repudium vero Sponsae remitti videtur: quod et in Vxoris personam non absurde cadit*¹.

¹ D. 50. 16.
101. 1.

*Inter Divortium et Repudium hoc interest, quod repudiari etiam futurum matrimonium potest: non recte autem Sponsa divortisse dicitur: quod Divortium ex eo dictum est, quod in diversas partes eunt, qui discedunt*².

² D. 50. 16.
191.

Repudium therefore, or the Dissolution of Espousals, differed greatly in Substance, and Effect, from *Divortium*. It differed also in the Form and Ceremony of it. For both were transacted by a certain *Carmen* or Form of Words, without which neither was valid: and the Phrase here was,

CONDICIONE TVA NON VTOR.

*In Repudiis autem, id est, Renunciatione, comprobata sunt haec verba: TVAS RES TIBI HABETO: item haec, TVAS RES TIBI AGITO. In Sponsalibus quoque discutiendis placuit Renunciationem intervenire oportere: In qua re haec verba probata sunt: CONDICIONE TVA NON VTOR*³.

³ D. 24. 2. 2.
1. and 2.

Where it is to be noted, that *Repudium* must here be taken in its general Signification. For that it may stand both for Genus and Species, is plain from a Law just now quoted⁴.

⁴ D. 50. 16.
101. 1. Add
D. 23. 2. 12.
pr.

2. The other thing to be observed, was, that in the Canon and Ecclesiastical Law, though Divorce be the Term for all Transactions of this kind, yet we ought to distinguish between that Act of the Ecclesiastical Judge, when He declares a Marriage to be *nullum et irritum ab initio*; and when He pronounces for a Separation of persons lawfully joyned by a celebration of Marriage without any Let or Impediment. The One is a Formal and Judicial Declaration of the Nullity of the Marriage-Contract, Celebration, &c. though performed in its utmost Solemnity: The Other interdicts the use of the Marriage Bed, Cohabitation, &c. either for some limited time, or indefinitely, but disturbs nothing that went before. The One is *Dissolutio Vinculi*, the other, *Separatio a Mensa et Thoro*. And the Reason of the Difference is plain and natural. The Cause of Action in the one case preceded the Tye of the Obligation; in the other, it followed it.

The former Case comprehends Contracts within the prohibited Degrees; a Matrimony celebrated with another Man's lawful Wife; Marriages against a Precontract (where that Doctrine prevails); and here he declares such Marriage *never to have been*. For, as we have observed lately,

⁵ Above, pag. 303. lately⁵, what is not done according to Law, goes for nothing, *pro infecto habetur*. And in this case, it is not only lawful for either Party to enter into another Contract, during the Life of each other, but moreover, in the last case, the Precontracted Party receives usually an Admonition from the Judge to make good his first Engagement.

These things being premised, it is asked in general, how a Divorce can be understood or allowed: what foundation there is in Reason and Nature for such a Practice: how Law comes to admit of a Conclusion against itself, sets out this to be a Promise or Contract for Life, and yet warrants a Dissolution of it?

It is asked, I say, how a Divorce can be understood or allowed, when *Nuptiae* are defined,

Viri et Mulieris Conjunctio, individuum *Vitae consuetudinem continens*⁶.

⁶ J. 1. 9. 1.

*Conjunctio Maris et Feminae, Consortium omnis Vitae, Divini et Humani Juris Communicatio*⁷.

⁷ D. 23. 2. 1.

⁸ D. 23. 3. 1.

So *Paulus*⁸,

*Dotis Causa perpetua est, cum voto ejus qui dat, ita contrahitur, ut semper apud maritum sit*⁹.

⁹ See A. Fab. ad Tit. de Nuptiis, Princ. III. Illat. 8.

¹⁰ *Heautontimorumenos*. II. 4. 12.

Thus *Terence*¹⁰,

Vobis cum uno semel ubi aetatem agere decretum est viro, Cujus mos maxime est consimilis vestrum, hi se ad vos applicant, Hoc beneficio utrique ab utrisque vero devincimini, Ut nunquam ulla amoris vestro incidere possit calamitas.

¹¹ 4. *Epigrammata*. XIII. 7.

*Martial*¹¹,

Candida perpetuo reside Concordia lecto, Tamque pari semper sit Venus aequa iugo. Diligat ipsa senem quondam; sed et ipsa Marito, Tunc quoque cum fuerit, non videatur Anus.

¹² 1. *Ode*. XIII. fin.

And *Horace*¹²,

Irrupta tenet copula; nec malis Divulsus querimoniis Suprema citius solvit amor die.

I observe therefore, in answer, that these and such Expressions mean the Purport, the Intent and Desire of the Contracting Parties. And what happens *praeter istam spem*, may still with propriety enough suit with the Terms *Unalterable* and *Perpetual*. And in a Sense like this must be understood the *Individuus Comes* in *Tacitus*¹³, and the word *Individuus* in many passages of the Civil Law also¹⁴.

¹³ VI. *Annals*. 10.

¹⁴ D. 26. 7. 32. 6.

1. 46. § 1. cod.

¹⁵ pag. 341.

And though a *Licentia Divortendi* would destroy the very Essentials of Matrimony, (like that Fancy of *Euripides* lately cited¹⁵, viz. of changing a Wife,

a Wife, till a Man had got one to his liking) and is accordingly in all Civil States very much discountenanced, and for that reason all Matrimonial Processes are directed to be with great Circumspection⁷; yet Divorces must sometimes be necessarily admitted, *viz.* when the Ends of ^{7C.5.17.8.pr. Canon. 1603. CV. CVI.} Matrimony cannot be obtained, or well secured, by the Observation of the Contract. Thus the Case of Impotence or Frigidity in the Husband, or an adulterous Commerce on the Woman's part: Causeless ill Usage in the former, and *maliciosa Desertio* in the latter, have been in many Constitutions a Foundation for the aggrieved Party to sollicite a Dissolution, or rather a Separation.

For, as a good Writer upon Natural Law⁸ observes, there is a *Just Cause* for Separation, or *no Just Cause*. If the first, (as for instance, where the Wife defiles the Husband's Bed, or forsakes it) all the Laws of Reason and Nature require, that no one Party in a Contract should be tyed to the Performance, when the other Party had broken his Covenant. For all Contracts are reciprocal. If the latter, no Separation can be good, because the Right acquired to a Person by a Contract, cannot be taken away without his Consent.

Thus then that Text of St. Matthew⁹, *Quod Deus conjunxit, Homo ne⁹ separat*, like the Terms *Perpetuity* and *Individuality*, which We have been just considering, is indeed of a General Nature, but like the rest of general cases, admits of something to be excepted. That it is not to be taken in its utmost Rigor and Universality, is clear from that Authority, which pronounced it. Who could never be supposed, to allow, in one Text¹, of *no* Exception, and in another immediately following², to admit of *one* at least, which is said to be that of Fornication. To which^{2 v. 6.} may be added, that his Apostle, who spake by his Authority, has added^{2 v. 9. Add. V. 32.} another³, *viz.* that of *Maliciosa Desertio*. If indeed, it be another, and^{3 1 Cor. VII.} not rather comprehended under the former, *quia redolet speciem adulterii*¹⁵ *praesumpti*, to use the words of a good Writer. Indeed the Case of Adultery, which seems to be the Exception laid down in the Gospel, has been looked upon as the Touch-stone or *Criterion*, by which all Separations can fairly be justified. And a very sensible Writer, now before me, has given the words of St. Matthew⁴,

Εγὼ δὲ λέγω ὑμῖν, ὅτι ὃς ἂν ἀπολύσῃ τὴν γυναῖκα αὐτῆς, παρεκτὸς λόγου πορνείας, ποιῇ αὐτὴν μοιχᾶσθαι,

this Turn, *viz.* that no Cause for Separation could be good, except Adultery, or such Facts as had the nature, the λόγον, *rationem*, of Adultery; such as were like it, tended to it, or, in short, would finally defeat and interrupt the destined End of this Institution, as Adultery actually did.

It has been apprehended, that these Texts in the New Testament, concerning the matter of Divorce, have such connection with the same Doctrine, and same Subject, in the Old, that the Jewish Nation was principally, if

if not totally, interested in the Application of them. Be that as it will, I think Πορνεία can with no propriety be rendered Adultery; and then all the Conclusions which are raised upon that Explication, will come to nothing.

C. 5. 17. 8.
2. and 3. Add
Nov. 22. 15.
and 117. 8.

But to leave the Interpretation of a controverted piece of Scripture, there is this to be learned however from the care and sollicitude, which appears in these passages, and any others, to guard this Union against any frivolous or unwarrantable Dissolutions of it, viz. that many Reasons have been admitted at different times and by different People, which are entirely unjustifiable. Of which my Reader will find a goodly Catalogue in a Constitution of the Emperors *Theodosius* and *Valentinian*⁵, which the modern Practice has considerably reduced. And I am satisfied, that many of my Fair Country-Women would think it hard, to have this Cause of Divorce (to instance in one out of many) revived,

* Nov. 117. 8.
6.

*Si Circensibus, aut Theatris, aut Amphitheatris interfuit ad spectandum, ignorante aut prohibente viro*⁶.

It has been often a Matter of Wonder, how the Christian Emperors could admit of Divorces in such a Latitude. With the Heathens and the older Romans We are not to be astonished, if the *Jus Divortendi* was very frequent and very scandalous. And this leads me to consider a little how it stood anciently.

The *Athenians* did not seem to give into this Licence with half the Appetite, as the *Romans* did, who yet piqued themselves in copying their best manner, and sifting the Flower of their Constitution. By the Establishment of *Solon*, there was no Divorce *bona gratia* (as the Roman Civilians term that Indulgence of their Country) but the matter of Complaint was cognizable by the Judge, and constituted an Action, called Αποπομπής * in the case of the Husband, of Απολείψεως † on the part of the Wife. The Terms were very significant, and well contrasted. The Husband, who was *Dominus*, and in *Potestate habebat*; whose was the Sovereignty, and the Mansion; might be properly said, ἀποπέμπειν ||; but not the Wife, who could not be said to *turn away* her Husband, but to *leave* him.

* in vit. Alcibiad.

There is another very remarkable Circumstance in that Legislation. This Bill of Divorce, this Δίκη Απολείψεως on the Woman's side, must be prosecuted personally, and not by Proctors. And the reason given for it by *Plutarch*⁷, is humane and tender:

Καὶ γὰρ ὁ νόμος δοκεῖ διὰ τῆτο προάγειν τὴν ἀπολείψαν εἰς τὸ δημόσιον ΑΥΤΗΝ, ὅπως ἐγγενῆσαι τῷ ἀνδρὶ συμβῆναι καὶ καλῶσχεῖν §.

* *Ejectionis.*

† *Religionis.*

|| *Ejicere.*

§ *Ideo autem videtur Lex mulierem quae libellum repudii offert, in publicum ipsam producere, ut facultas daretur viro gratiam cum ea ineundi et retinendi.*

This Reflection is introduced upon a Case, which happened between *Alcibiades* and his Wife :

Εὐτακὺς ἦεν καὶ φίλανδρος ἡ Ἰππαρέτη, λυπεμένη δ' ὑπ' αὐτῇ περὶ τὸν γάμον ἐταίραις ξέναις καὶ ἀσπαῖς συνόντῃ, ἐκ τῆς οἰκίας ἀπιῖσα, πρὸς τὸν ἀδελφὸν ὤχετο. Τῇ δ' Ἀλκιβιάδῃ μὴ φροντίζοντῃ, ἀλλὰ τρυφῶντῃ, ἔδειτο τῆς ἀπολείψεως γράμματι παρὰ τῷ Ἀρχοντὶ δεσθαι, μὴ δὲ ἑτέρων, ἀλλ' αὐτὴν παρῆσαν. ὡς ἔν παρῇν τῷτο πράξασα κατὰ τὸν νόμον, ἐπεξελθὼν ὁ Ἀλκιβιάδης, καὶ συναρπάσας αὐτὴν, ἀπῆλθεν δι' ἀγορᾶς οἰκαδὲ κομίζων — ἐμεινέ μένοι παρ' αὐτῷ μέχρι τελευτῆς *.

And then follows the Remark I mentioned.

The same Story is recorded by a good Writer, but a forgotten one ; and perhaps a mistaken one :

* See Left Ly-
fiac. C. 6.

Λαβὼν δὲ [*Alcibiades*] τοσαύτην προῖκα ὅσην ὕδεις τῶν Ἑλλήνων, ἔτις ὕδρις ἦν, εἰσάγων εἰς τὴν αὐτὴν οἰκίαν ἐταίρας καὶ δέλας καὶ ἐλευθέρας, ὡς ἡνάγκασε τὴν γυναῖκα σωφρονεσάτην ἔσαν ἀπολιπεῖν, ἐλθεσαν πρὸς τὸν Ἀρχοντα, κατὰ τὸν νόμον. Οὗ δὲ μάλιστα τὴν αὐτὴν δύναμιν ὑπεδείξατο. Παρακαλέσας γὰρ τὰς ἐταίρας, ἀρπάσας ἐκ τῆς ἀγορᾶς τὴν γυναῖκα ὤχετο βίαν†.

† Andocid. c.
Alcib. pag. 30.
Edit. H.
Steph.

If my Reader will allow me a little Digression, which this last Passage suggests, it is possible He may not repent of his Indulgence.

Alcibiades is here said to have married the best Fortune in Athens. She was the Sister of *Callias*, and the Daughter of *Hipponicus*¹. These Circumstances are so well attested by an infinity of ancient Testimonies, that I wonder, what should tempt *J. Meursius*², a very diligent Inquirer, but a less successful Critic, to alter the Text of *Andocides*, and for *Hipponicus*, to substitute *Hippocrates*. I am interested in bringing forwards some of the Testimonies I mentioned, not so much to confute *Meursius*, as to establish the Point I principally had in view, and which I promised my Reader.

¹ Id. Orat. cit.

² III. Attic.
Left. 23.

Ἰππονίκῳ τῷ Καλλίῃ πατρὶ, καὶ δόξαν ἔχοντι μεγάλην, καὶ δύναμιν ἀπὸ ΠΛΟΥΤΟΥ καὶ γένος ἐνέτριψε κόνδυλον [*Alcibiades*] — ὁ δὲ συνέγνω, καὶ τὴν ὀργὴν ἀφήκεν, ὕστερον δὲ τῆς ΘΥΓΑΤΡΟΣ Ἰππαρέτης ἐποίησά το νυμφίον. ||

³ Plutarch. in
Alcib. T. II.
pag. 12. Edit.
Bryan.

* *Hipparete, casta femina, et viri amans, quum esset impatiens injuriarum genialis tori, quod consuetudinem ille haberet cum meretricibus peregrinis et urbanis, divertit ab eo, et contulit se ad fratrem. Non curante id Alcibiade, sed lubenter ferente, oportebat eam divortii monumenta apud Archontem deponere, non per alios, sed ipsam praesentem. Quae ubi adfuit, ut id ex lege ageret, irrupens Alcibiades rapuit eam, medioque foro domum ferens abiit — atque illa mansit apud eum, quoad vixit.*

† *Acceptaque tali et tanta dote, qualem nullus unquam Graecorum, adeo insolens fuit, ut in eandem domum meretrices et liberas et servas duceret, ita ut uxorem, quamvis pudicissimam, cogeret eum deserere, et secundum leges ad Praetorem confugere; ubi maxime Tyrannidem suam ostendit. Advocatis namque familiaribus, e tribunali uxorem suam vi rapiens abiit.*

|| *Hipponico Calliae patri, cui divitiae et nobilitas ingens nomen et opes conciliaverant, infixit colaphum [Alcibiades] — qui deposita ira ignoravit ei, et postmodum dedit ei nuptui filiam Hippareten.*

Μετὰ δὲ ταῦτα, τὴν μητέρα τὴν ἡμετέραν ἔγημεν. Ἠγῆμαι δὲ καὶ ταύτην ἀριστεῖον αὐτὸν λαβεῖν. Ὁ γὰρ πατὴρ αὐτῆς Ἰππώνικος ΠΛΟΥΤΩΙ μὲν ἦν πρῶτος τῶν Ἑλλήνων.*

*Alcibiad. Junior apud Isocr. Orat. de Bigis.

⁷ Lyfias, pag. 349. Ed. Lond. Maximus Tyrus, Differt. XI. Nov. Edit. Plutarch, in Pericle, T. I. pag. 365.

Id. de Herodot. Malign. and again de Amore Divit.

Corn. Nep. Vit. Cimon. init.

Themist. Orat. XXIII.

Libanius, Orat. de Servitute.

And the Authors quoted in the following Notes.

⁸ Plutarch, in Aristid. T. II. pag. 295.

Aeschines Dial. II. 9.

⁹ l. c.

¹ V. Λακκό-πρωτος.

² XI. Cent. 74.

³ XII. 9.

⁴ in Aristid. l. c.

⁵ Nub. v. 64.

⁶ Epist. 8.

⁷ in Vit. Alcib. cap. 2.

Besides the above Testimonies, the Riches of this Family are upon the strongest Record of any one Fact perhaps in Antiquity, as the Authors here quoted will abundantly shew⁷. And upon that account went into a Proverb⁸. Though the *Foundation* of this great Wealth in the House of *Hipponicus* and *Callias* (if the same *Callias* is always to be understood) is variously accounted for. *Nepos* gives one History of it⁹; *Suidas*¹, and *Mich. Apostolius*² another. *Athenaeus*³ a third. *Plutarch*⁴, and the Scholiast of *Aristophanes*⁵ furnish a fourth. And *Themistocles*⁶, if any Credit can be given to those Letters, differs from them all.

But after a Fact so well established, what can any one think, when He comes to that Passage in *Corn. Nepos*⁷, which many have looked upon as deplorable?

Educatus est [Alcibiades] *in domo Periclis* — *eruditus a Socrate.*

Socerum habuit Hipponicum, OMNIVM GRAECAE LINGVAE ELOQVENTIA DISERTISSIMVM. *Vt si ipse fingere vellet, neque plura bona reminisci, neque majora posset consequi, quam vel Fortuna vel Natura tribuerat.*

Here I must dispute the *Leger-de-main* of the Passage, and am not content that the *Eloquence* of *Hipponicus* should pass upon me, which no one single Writer has recorded; when I expected his *Fortunes*, which have been the Attention of so many. Especially, if We consider, that the *Former* Consideration has nothing to do here, and the *Latter*, a great deal: *E. G.*

Alcibiades, besides the gifts of Nature, which He had in great abundance, was indebted also not a little to the Favours of Fortune. He was trained up in the Family of Pericles, the first Statesman of his Age: His Education was under Socrates: and He marry'd the greatest Fortune in the City.

Great Consistency! And to this Sense many MSS. of good account approximate, by reading for *disertissimum*, *ditissimum*: and Lambin moreover felt the weight of the Evidence, when, in the rage of his Criticism, He cuts off the Difficulty that remained behind, and reads at once, without Shame or Remorse,

Omnium Graecorum divitissimum, or, ditissimum.

But this is surely *Secanti, non Enodanti simillimum*. A cooler Temper would have conducted him to the Manner of *Nepos*, and the Peculiarity

* Posthaec matrem nostram uxorem duxit. Nam et hanc eum praemii loco propter excellentem virtutem accepisse cenfeo. Cujus pater Hipponicus opibus primus fuit inter Graecos.

which

which that Author had of expressing, what He conceived in common with others. Thus, for instance, when *Dion* of Syracuse, a Grecian born, was sent in a public Character to Carthage, the Words of my Author are ⁸:

⁸ in Dion.
cap. 1. fin.

Hunc a Dionysio missum Karthaginenses suspexerunt, ut neminem unquam Graeca lingua loquentem magis sint admirati.

But as scrupulous Apprehensions may think this Passage somewhat exceptionable, let us see another of the same Author ⁹:

⁹ in Miltiad.
cap. 3.

Sic enim putavit [Darius] facillime se Graeca lingua loquentes, qui Asiam incoherent, sub sua retenturum potestate, si amicis suis oppida tuenda tradidisset.

Such is the Style of *Cornelius*, for the *Greeks*, that had settled on the Coast of the Lesser Asia.

And now can any One dispute this Emendation of the Place before us? viz.

Socerum habuit Hipponicum, omnium GRAECA LINGVA LOQUENTIVM divitissimum.

To recover the Thread of my Discourse: We find these Words *Απολείπειν* and *Αποπέμπειν* carefully distinguished.

Γυνή τοίνυν διὰ ζήλοῦ πείαν ΑΠΟΛΕΙΨΙΝ γράφουσα * — *

* Plutarch.
Connub.
Praecept.

And indeed this Precision of Language was maintained, in the common Events of Life, when the Woman left the Husband's Family, without the Consideration of Divorce:

Τῇ ἀνδρὸς αὐτῇ τελευτήσαντι, ΑΠΟΛΙΠΟΥΣΑ τὸν οἶκον † — †

* Demosth.
adv. Boeot. B.
n. 8. Ed.
Benen.

So *Homer*,

Κακὸν δέ με πολλ' ἀποτίνειν
Ἰκαρίῳ, αἷκ' αὐτὸς ἐκὼν ΑΠΟ μητέρα ΠΕΜΨΩ †. §

† Od. B. 132.

In the rigorous Spirit of the old Roman Law, which owed its Appointment to *Romulus*, (if any such Accounts can be relied on) the Husband, in his great Plenitude of Power, could dismiss his Wife at pleasure, and uncontrollably, and the Wife had no Redress against Him ⁴.

* Plutarch. in
Romulo, pag.
67. T. I. Ed.
Bryan.

Considering the Power He had over her Person, even the Power of Life and Death in the case of Adultery, this Sovereignty was not very extraordinary. And *Dionysius Halic.* informs us, that the Crime of Drinking strong Liquors was punishable equal with Adultery. I need not mention, upon what Principle That was founded: the Reason is obvious to every body at first hearing. But my Reader need not there-

* *Mulier igitur propter Zelotypiam libellum Desertionis scribens* —

† *Cum Maritus decessisset, Vxor domum relinquens* —

§ *Miserum vero esset me multa rependere
Icario, si ipse mea sponte matrem dimisero.*

fore be defrauded of a good Passage of *Dionysius* relating to this very Article :

Ταῦτα δὲ οἱ συγγενεῖς μετὰ τῷ ἀνδρὶ ἐδίκασον· ἐν οἷς ἦν φθορὰ σώματος, καὶ, ὃ πάντων ἐλάχιστον ἀμαρτημάτων Ἑλλήσι δόξειεν ἂν ὑπάρχειν, Εἰς Οἶνον ἔτρεθειν Πιούσα Γυνή. Ἀμφοτέρω γὰρ ταῦτα ζημιῶν ἐκέλευσεν ὁ Ρωμύλος, ὡς ἀμαρτημάτων γυναικείων ἔσχατα. ΦΘΟΡΑΝ μὲν, ἀπονοίας ἀρχὴν νομίσας. ΜΕΘΗΝ δὲ φθορὰς. Καὶ μέχρι πολλῆ διέμενε χρόνον ταῦτ' ἀμφοτέρω παρὰ Ρωμαίοις ἀπαραιτήτῃ τυγχάνουσα ὀργῆς. μάρτυς δὲ τῷ καλῶς ἔχειν τὸν περὶ τῶν γυναικῶν νόμον ὁ πολὺς χρόνος.*

⁵ II. Antiqq.

Rom. 25.

Plin. XI V. 13.

Valer. Max-

im. II. 1. 5. &

VI. 3. 9.

Gell. X. 23.

Cic. IV. de

Rep. apud

Nonium. I. 14.

Granius Lici-

nianus apud

Serv. ad Virg.

I. Aen. 741.

⁶ Athen. X. 7.

Aelian. II.

V. H. 38.

But this was the Prudence of other Legislators, besides the Founder of Rome :

Παρὰ δὲ Μασσαλιώταις ἄλλος νόμος, τὰς γυναῖκας ὑδροπατεῖν. Ἐν δὲ Μιλήτῳ ἔτι καὶ νῦν φησι Θεόφραστος τὴν εἶναι τὸ νόμιμον.[†]

This Severity of the Romans, in regard to the Abstinence of their Wives, is recorded by many Writers, and gave occasion to the Custom so prevalent amongst them, of the Wife's being frequently saluted by her Husband and Relations, in order to detect her Disobedience.

Παρὰ Ρωμαίοις, ὡς φησι Πολύβιος ἐν τῇ ἑκτῇ, ἀπειρήσαι γυναῖξιν πίνειν οἶνον——λαθεῖν δὲ ἐς αὐτὸν τὴν γυναῖκα πιῆσαν οἶνον. Πρῶτον μὲν γὰρ εἰς ἑαυτὴν οἶνον κυρεῖαν ἢ γυνή. πρὸς δὲ τέτοις, φιλεῖν δεῖ τὰς συγγενεῖς τὰς ἑαυτῆς, καὶ τὰς τῷ ἀνδρὶ, ἕως ἐξανειψίων, καὶ τὸ ποιεῖν καθ' ἡμέραν, ὅποταν ἴδῃ πρῶτον. λοιπὸν ἔν, ἀδήλα τῆς ἐνθυμίας ἔσης τίσιν ἀπαντήσῃ, φυλάσσεσθαι. τὸ γὰρ πρᾶγμα, καὶ γεύσῃται μόνον, εἰ προσδεῖ διαβολῆς.⁷ §

⁷ Id. X. II.

So cautious were the Romans of the Virtue of their Wives. But the Custom I am concerned in is minutely told by *Tertullian*⁸:

⁸ Apologet.

pag. 7. Edit.

Rigalt. Lutet.

1634. Fol.

Cum aurum nulla [femina] norat praeter unico digito, quem Sponsus oppignerasset, pronubo annulo; cum mulieres usque adeo vino abstinerentur, ut Matronam ob resignatos cellae vinariae loculos sui inedia necarint: sub Romulo vero, quae vinum attigerat, impune a Mecenio

* De his vero cognoscebant Cognati cum Viro: ubi violata fuisset pudicitia, et, quod omnium peccatorum levissimum Graecis videretur, siquam mulierem vinum bibisse constitisset. Romulus enim hoc utrumque ut muliebrium delictorum gravissimum, puniri iussit; quia stuprum desperatae audaciae, ebrietatem vero stupri originem esse iudicavit. Et diu duravit hoc utrumque apud Romanos, ita ut inexorabilis esset ira. Quod autem Lex illa de mulieribus lata praeclara fuerit, ipsa temperis diuturnitas fidem facit.

† Apud Massilienses lege cautum, abstemiae ut sint Mulieres. Apud Milesios etiam nunc de hac re legem exstare scribit Theophrastus.

§ Apud Romanos, ut inquit Polybius libro sexto, vino mulieribus interdictum est——vinum autem si qua biberit, celare id non potest, primum quidem, quod cellam vinariam non committant mulieri: deinde quod eam osculentur tum sui, tum mariti cognati, ad consobrinos usque, et id quotidie, ubi statim illam adspexerint. Restat ergo, ut a vino caveat, cum nesciat, quibus obvia futura sit, et qui allocuturi. Itaque si vel minimum tantum degustarit, non desunt, qui arguant et rem prodant.

marito

marito trucidata est. Idcirco et oscula propinquis offerre necessitas erat, ut spiritu judicarentur.

It is also alluded to by *Plutarch*²,

² *Quæst. Rom.*

Διατί τὰς συγγενεῖς τῷ σώματι φιλεῖσιν αἱ γυναῖκες; Πότερον, ὥς οἱ πλεῖστοι νομίζουσιν, ἀπειρημένον ἢ πίνειν οἶνον ταῖς γυναῖξιν; ὅπως ἔναι αἱ πῖναι μὴ λαμβάνωσιν, ἀλλὰ ἐλέγχωνται περιτυγχάνεσθαι τοῖς οἰκείοις, ἐνομίσθη καὶ ἀφιλεῖν.*

My Author then proceeds to assign another probable Cause of this old Custom, which He likewise repeats in his *Life of Romulus*¹.

¹ *init.*

Thus *A. Gellius*²,

² *X. 23.*

Mulieres Romae atque in Latio aetatem abstemias egisse, hoc est, vino semper, quod temetum prisca lingua appellatur, abstinuisse; institutumque ut cognatis osculum ferrent, reprehendendi causa, ut odor indicium faceret, si bibissent.

The same is recorded by *Cato*³, and *Arnobius*⁴. Something more may be seen upon this Head in *Pancirollus*⁵, and in a tolerable Account wrote by *Dan. Frid. Janus, De Vini usu Feminis Romanorum interdicto*⁶.

³ *apud Plin. XIV. 13.*

⁴ *lib. II. adv. Gentes, pag. 91. Ed. Lugd. 1651. 4.*

⁵ *I. Thef. Var. Lect. 94.*

⁶ *Miscell. Lips. Tom. III.*

I know a very ingenious Writer, who derives the present Ceremony (now in fashion, I believe, all over Europe) of *saluting the Bride*, from this very Practice of the Romans. If my Reader was acquainted with but half the Passages I could produce, wherein modern Customs, though somewhat alienated from their original Design and Institution, retain however so much of their old Feature or Complexion, as to claim an indisputable Relation to some Roman or Grecian Solemnity, He would not be startled, as perhaps He was, at the first mention of this Opinion. I was tempted here to lay before him an Instance or two of this sort; of which I have by me a plentiful Collection: but was checked upon the Reflection, that I but very lately took him out of the Road, to shew him a Prospect, and therefore rather chose to prosecute my Journey; to which it is possible He now may have no Objection.

In *Pliny* We read⁷,

⁷ *XIV. 13.*

Cn. Domitius Judex pronunciavit, Mulierem videri plus bibisse, quam valetudinis causa, viro insciente, et dote multavit.

And again⁸,

⁸ *Ibid. Add Valer. Max. VI. 3. 9.*

Invenimus inter exempla Egnatii Mecenii uxorem, quod vinum bibisset e dolio, interfectam fusti a marito, eumque caedis a Romulo absolutum.

It must not be forgot, that this Interdict against the Sex found a Place also in the XII. Tables, according to *Ritterbusius*⁹.

⁹ *ad XII. Tab. Cap. 7.*

* *Quare mulieres cognatos suos ore osculantur? Anne, ut plerique existimant, feminis vetitum erat vinum bibere? Vt igitur non celentur, sed convincantur cum cognatis congregantes, statutum erat, ut eos osculo exciperent.*

In the early and dark (I had almost said the Romantic) History of this People, there is so much Perplexity and Disagreement, that those who live at a distance are not able to clear their Way. Thus, We are sometimes told of the arbitrary and sanguinary Majesty of the *Paterfam.* lording it over the Persons of his little Empire, with a despotic and more than Asiatic Tyranny: at other times We see him like a cool and dispassionate Judge, forming a domestic kind of Jurisdiction, and pronouncing upon the Verdict of the fairest Jury, that ever was impanelled, the Friends and Relations of both the Parties at Controversy. So in regard to the Inquest now before us:

² Dion. Halic.
II. 25.

Ταῦτα οἱ συγγενεῖς μετὰ τῷ ἀνδρὶ ἐδίκαζον.*

³ Valer. Max-
im. II. 1. 8.

Convivium etiam solenne Majores instituerunt, idque Charistia appellarunt, cui praeter Cognatos et Affines nemo interponebatur: ut si quainter necessarios querela esset orta, apud sacra mensae, et hilaritatem animorum, fautoribus concordiae adhibitis, tolleretur¹.

⁴ Sueton. Tib.
35.

Matronas prostratae, pudicitiae quibus Accusator publicus deesset, ut propinqui majorum more de communi sententia coercerent, auctor fuit⁴.

⁵ Valer. Max.
VI. 3. 8.

Publicia autem, quae Posthumium Albinum Consulem; item Licinia, quae Claudium Asellum, viros suos, veneno necaverant, propinquorum decreto strangulatae sunt. Non enim putaverunt severissimi Viri in tam evidenti scelere longum publicae quaestionis tempus expectandum. Itaque quarum innocentium defensores fuissent, fontium maturi vindices exstiterunt⁵.

It was so in the case of the Paternal Jurisdiction also:

⁶ Liv. II. 41.

Sunt, qui Patrem auctorem ejus supplicii fecerunt: eum cognita domi causa verberasse et necasse, peculiumque filii Cereri sacravisse⁶.

⁷ Valer. Max.
V. 8. 2.

⁸ Id. Valer. V.
8. 3. V. 9. 1.

Senec. I. de
Clement. 15.

Epitom. Liv.
Liv. 9.

Quintilian.
III. Declam.
17.

⁹ Valer. Max.
VI. 3. 7.

Hujus aemulatus exemplum Cassius, filium, qui Trib. pl. Agrariam Legem primus tulerat—postquam illam potestatem deposuit, adhibito propinquorum et amicorum consilio, affectatae regni crimine domi damnavit; verberibusque affectum necari jussit: ac peculium ejus Cereri consecravit⁷.

Many Instances of these domestic Assessors are not wanting, and may be consulted, if need require⁸.

And, what is remarkable, the Execution of the Law seems to have been in the same hands too:

A quibus cum multae essent damnatae, in omnes cognati intra domos animadverterunt⁹.

* De his vero cognoscebant Cognati cum Viro.

*Mulieres damnatas Cognatis, aut in quorum manu essent, tradebant, ut ipsi in privato animadverterent in eas*¹.

¹ Liv. XXXIX. 18.

It may be asked also with great Propriety, why the elder Legislators, Romulus, Numa, and the Decemviri, should be so solicitous to enact Laws about Divorces, and restrain the Frequency of that Disorder, if yet it is true, what all their Books record, that down to the Instance of Sp. Carvilius Ruga, who lived A. V. C. 520. there was no single instance of this Complaint. We lately² thought it an Essential of Positive Law to wait for Facts, not to suggest them: to ground its Prohibitions upon the actual Commission of something improper, and not to teach and point out Improperities:

*Ideo Leges in Facta constitui, quia Futura in incerto sint. Sic a majoribus institutum, ut si antissent delicta, poenae sequerentur*³.

³ Tacit. III. Annal. 69.

But that this Tradition is true, as to Carvilius, seems to be the Concurrence of all Historians who record it *pene dedita opera*.

Ομολογεῖται ἐντὸς ἐτῶν εἴκοσι καὶ πεντακοσίων μηδεὶς ἐν Ῥώμῃ διαλυθῆναι γάμος. κατὰ δὲ τὴν ἐβδόμην ἐπὶ ταῖς τριάκοντα καὶ ἑκατὸν Ολυμπιάσιν ὑπαλειόντων Μάρκου Πομπωνίου καὶ Γαίου Παπυρίου, πρῶτος ἀπολῖσαι λέγεται τὴν ἑαυτῆς γυναῖκα Σπέρσιος Καρβίλλιος⁴.

⁴ Dion. Halic. II. 25.

*Repudium inter Vxorem et Virum a condita Vrbe usque ad vicesimum et quingentesimum annum nullum intercessit. Primus autem Sp. Carvilius uxorem, sterilitatis causa, dimisit. Qui quanquam tolerabili ratione motus videbatur, reprehensione tamen non caruit: quia nec cupiditatem quidem liberorum conjugali fidei proponi debuisse arbitrabantur*⁵.

⁵ Valer. Max. II. 1. 4.

It is supported also by Gellius⁶, Plutarch⁷, and Tertullian⁸.

⁶ IV. N. A. 3^o XVII. ult.

I would ask also, if any Man could give me satisfaction, why this Fact should be so greatly condemned in Carvilius, who, upon the matter, and in a Consideration purely Civil and Political, had so good a Foundation for it: and yet the same People should admit the most inconsiderable Circumstance, the Whim, the Meagrim, or the fantastic Disposition of a cloudy Husband, to be a sufficient and justifiable Cause in others.

⁷ in Comparat. Numae and Lycurgi. And again Quaest. Rom. 14.

For P. Aemilius, who was Consul A. 672. is said to have sent away his Wife, a handsome and fruitful One, *without any reason at all*; except his *Bon Mot* should be admitted for one; viz. *My Shoe, Countrymen, is a very handsome one, but there is none of you can tell where it pinches me*⁹.

⁸ Apologet. pag. 7. Ed. Rigalt. Lut. 1634. Fol.

I find C. Sulpicius Gallus repudiating his Wife, because He had seen her abroad with her Head uncovered¹; P. Sempronius Sophus, because His had

⁹ Plutarch. in vit. T. II. Ed. Bryan. p. 15. and again Connub. Praec.

* In confesso est nullas intra Annos DXX. Romae nuptias fuisse divortio dissolutas. Olympiade vero CXXXVII. Cos. M. Pomponia et C. Papyrio, primus Sp. Carvilius uxorem repudiasse dicitur.

Hieron. adv. Jovinian. l. 1. fin.

¹ Valer. Max. VI. 3. 10.

² Ib. n. 12. been at a public Shew, without his Knowledge²: and *Q. Aufidius Vetus*, who saw his Wife conversing in public with a Woman of a low Condition³.

The very Sterility, which was not allowed to pass with *Carvilius* for a reasonable Motive, was afterwards approved of.

⁴ Cap. 2. Thus *Nonius*⁴ from *Varro*:

Betere est Ire. Varro. Affanos multos quod parere ea non poterat mulier foras betere iussit.

⁵ Sueton. Ner. 35. Thus *Nero* dismissed *Octavia*, *propter sterilitatem*⁵. And though *Suetonius* adds *improbante divortium populo*, yet upon a Comparison of the Authors, who have related this Fact, the People's Discontent was occasioned more by their Attachment to *Octavia*, and the secret Motives of this Dismission (the Intrigues of the Mistress) than any Objection they had to the Cause assigned for this Separation. And accordingly We read,⁶

⁶ D. 24. l. 60. et 61.

Divortii causa donationes inter Virum et Vxorem concessae sunt. Saepe enim evenit, uti propter Sacerdotium, vel etiam Sterilitatem,

Vel Senectutem, aut Valetudinem, aut Militiam satis, commode retineri Matrimonium non posset.

Et ideo bona gratia Matrimonium dissolvitur.

Augustus put away one of his Wives, because He did not like her Temper⁷. As He had also one before, upon a Falling-out with her Mother⁸. *Claudius* besides one Wife, that He dismissed *ex levibus offensis*⁹, turned out two more for Incontinence¹. So *M. Antony* repudiated his Wife upon a bare Suspicion of Intrigue². And *Julius*, who got the better of every body in every thing, dismissed his Wife, that the Partner of *Caesar's* Bed should not be suspected.

⁷ Sueton. in vit. 62.

⁸ Id. ibid.

⁹ Sueton. in Claud. 26.

¹ Id. ibid.

² Plutarch. in vit. pag. 74. T. V. Ed. Bryan.

³ Plutarch. in vit. Caton.

minor. p. 239. T. IV. Ed. Bryan.

⁴ l. XI.

⁵ II. B. Civil.

⁶ X. 5.

⁷ Apologet. c. 39.

⁸ adv. Jovinian. l. 1. vers. fin.

⁹ Sueton. in Aug. 62.

It is very common, in the Roman History, to read of the extraordinary Indifference, with which that grave and sensible People parted with their Wives upon very surprising Occasions, and for very singular Purposes. *Cato*, with a very philosophical Temper, could oblige his Friend *Hortensius* with the Loan of a Wife; though She was breeding at the same time; and afterwards could take her again. The Story is worth reading at large; and many Authors have mentioned it, *Strabo*³, *Appian*⁴, *Quintilian*⁵, *Tertullian*⁶, and *St. Jerom*⁷. The Marriage of *Augustus* with his favourite Wife *Livia Drusilla* is very well known:

*Liviam Drusillam, matrimonio Tiberii Neronis et quidem praegnantem abduxit, dilexitque ac probavit unice ac perseveranter*⁹.

Where *abduxit* cannot relate to any Compulsion that was wanted: For *Dion Cassius* tells us, that the First Husband was so very obliging upon the Occasion, that He acted the part of the Father, and gave her away.

But

But these Instances, or most of them at least, shew only some extraordinary Sallies of particular People, or the Absoluteness of their Emperors; by no means the Tenor and constant Frame of their *Jus Matrimonii*. The Case of *Cato*, lately mentioned, is introduced by *Plutarch*^{7 1. c.} as a Problematical one: and his Words upon the Occasion are,

Περὶ ἧς [*Marcia, Cato's Wife*] ὁ πλεῖστος λόγος. Καθάπερ ἐν δράματι τῷ βίῳ τῆτο τὸ μέρος προβληματικῶδες γέγονε, καὶ ἄπορον.*

Rualdus, in his Observations upon this Passage⁸, has taken care to guard his Reader against the mistake of *Strabo* and *St. Austin* upon this very Particular. The Former of whom says, that this Fact of *Cato's* was according to the Custom of his Country, κατὰ παλαιὸν ἔθος and the Words of the Other are,

Quod in Rep. Romana non solum minime culpabiliter, verum etiam laudabiliter Cato fecisse perhibetur. Which is not true.

There are many Laws in the Pandect, where Mention is made of similar Liberties taken by the Women also in parting with their Husbands⁹, and several Cases are put; viz.

*Titia divortium a Seio fecit*¹,
*Maevia Titio repudium misit*²,

in regard to the Woman's Fortune upon that occasion.

Thus *Coelius* in his Correspondence with *Tully*³ acquaints him, as the News of the Day:

Paula Valeria, Soror Triarii, divortium sine causa, quo die Vir e Provincia venturus erat, fecit. Nuptura est D. Bruto.

To explain which Words be it understood, that the Romans for a long Season availed themselves of a very shameful Practice, viz. that when either Party was weary of their Bargain, though they had nothing to object to the other, no Impeachment of Infidelity, etc. they would separate, renounce their Engagements (as a Tradesman would withdraw his Partnership), and frequently enter, and that very suddenly, into a new one. This Practice was called *Divortium bona gratia*, and is frequently mentioned in the Law Books⁴. It is sometimes called *Repudium sine ulla querela*⁵, by the Greeks, μετ' εὐφημίας, and in the place last cited from *Tully*, *Divortium sine causa*.

Many Laws had been made from time to time to restrain this Practice, but without Effect. It may possibly be in relation to these; that the Words of *Naeivius*⁶ are to be understood,

Sonticum. Justum. Naeivius. Sonticam esse oportet causam, quamobrem perdas mulierem.

* Fuit hujus celebre nomen. Atque in vita Catonis, quomodo in Fabula, haec pars ambigua exstitit et perplexa.

⁹ D. 5. 1. 42.
24. 1. 57. et
64.
¹ D. 24. 3. 34.
² l. 38. eod.

⁴ D. 24. 1. 62.
40. 9. 14. 4.
C. 5. 13. unic.
16.
Nov. 22. 4.
and 98. 2. 2.
⁵ D. 24. 1. 57.
⁶ apud Felt.
pag. 517.

⁷ Plutarch. in
vit.

⁸ Aug. 34.

It was the Care of *Romulus*⁷, and, as it is said, of the XII. Tables. It was also the Attention of *Augustus*, as may be concluded from *Suetonius*⁸. But what little Effect all these Restraints had upon them, is plain from many Instances. The Roman Women seem to be incorrigible:

⁹ Senec. III.
de Benef.

*Nunquid jam ulla repudio erubescit, postquam illustres feminae non Consulatum numero, sed Maritorum, annos suos computant, et exeunt matrimonii causa, nubunt repudii?*⁹

¹ VI. Epigr. 7.

The Law of *Augustus*, viz. *Julia et Papia Poppaea*, was renewed by *Domitian*, and with the same success. So *Martial*¹,

*Julia Lex populis ex quo, Faustine, renata est,
Atque intrare domos jussa Pudicitia est,
Aut minus, aut certe non plus, tricesima lux est,
Et nubit decimo jam Thelesina viro.
Quae nubit toties, non nubit. Adultera lege est.
Offendor moecho simpliciore minus.*

² Nov. 117. 10.
C. 5. 17. 9.
Authent.

³ Nov. 140. pr.
and c. 1.

The *Bona Gratia* Divorces, or Dissolutions of Marriage *sine Causa Sententia*, still kept their Ground. With the Christian Emperors they were rather encouraged, upon the account of Monastic Vows, and Professions of Chastity. *Justinian* indeed stop'd the Current a little², but *Justin*, his Grandson, restored the old Practice³, which lasted, as far as We can judge, in the Eastern Empire, till the Ninth or Tenth Century, viz. to the time of *Leo* the Philosopher.

⁴ Above, pag.
345.

⁵ D. 24. 1. 35.
48. 5. 43.

⁶ D. 38. 11.
unic. fin.

It was necessary that all Dissolutions, and Suspensions, of the Marriage-Contract should be Formal and Notorious. The mere Entering into a League with *Titia*, was not a sufficient Renunciation or Dissolution of that with *Sempronia*, unless some Ceremonious Act, or Form of Words at least, should intervene to attest it: As is plain from a Passage of *Tully*, lately cited⁴: and from the Laws, which my Reader will find in the Margin⁵.

*Item Julia de Adulteriis, nisi certo modo divortium factum sit, pro infecto habet*⁶.

It was a Rule of Law, doubtless of that last cited, that Divorces should be attested by Seven Roman Citizens of the Age of Puberty.

⁷ D. 24. 2. 9.

*Nullum Divortium ratum est, nisi septem Civibus Romanis puberibus adhibitis, praeter libertum ejus qui divortium faciet*⁷.

The *Libertus* of the Complaining Party, was in the place of Clerk or Attorney: He was the Messenger or Agent, who was sent with the Warning.

⁸ Juven. VI.
146.

*Collige sarcinulas, dicet Libertus, et exi*⁸.

The Words therefore pronounced, or signified, by the *Libertus*, were *Verba legitima*, and had the force of a Citation. I am not of Opinion, that

that those which have been collected by the Moderns were *all* of this Solemnity, but only alluded to it, as something equivalent. Yet some are more Formal and Express.

*MV. Semper Tu huic verbo vitato
Abs tuo viro. CL. Cui verbo? MV. I FORAS MVLIER?⁹
Vxor, VADE FORAS, aut moribus utere nostris¹.
So Pacuvius²,
Te repudio, nec recipio naturam, dico FACESSI.
Another was,*

⁹ Plant. Casin.
II. 2. 35.
¹ Martial. 11.
Ep. CV. 1.
² apud Non.
Marcell. c. 4.

*TVAS RES TIBI HABETO.
TVAS RES TIBI AGITO³.
So Plautus⁴,*

³ D. 24. 2. 1.
⁴ Trinum. II.
1. 31.

*Apage sis, Amor :
RES TVAS TIBI HABE.*

*Quintilian⁵,
Tunc repudiatam Tu credis Vxorem, cum RES SVAS SIBI HABERE
jussa est, cum EGREDI DOMO.*

⁵ Declam.
CCLXII.

And of a Piece with this last, viz. as comprehending two Forms together, is that of *Titinius*, an old Roman Poet in his *Gemina*⁶:

⁶ apud Nonium-Marcellum c. 4.

*Aut aliquis vestrum nunciet
Geminae, ut RES SVAS PROCVRET, AEDIBVS FACESSAT.*

Something more of this in *Briffonius*⁷, *Schottus*⁸, and *Gothofred*⁹.

⁷ De Formul.
⁸ IV. Observ.

We observed before¹, that the Form was different in the Dissolution of Espousals: *Tua Conditione non utor*. For *Conditio* is the Overture only of a Match (indeed of any Bargain or Contract), sometimes of an obscene one, as

⁹ ad D. 24. 2.
2. 4.
¹ Above, pag.
349.
² Ter. Andr. I.
1. 52.

Accepit conditionem, dein quæstum occipit².

So that *uti conditione alicujus* is coming up to his Terms.

But *Conditio* is more frequently and emphatically used for a Treaty of Marriage :

*Remansit in coelibatu: neque sollicitari ulla conditione amplius potuit³.
Quum, propter suam gratiam et Caesaris potentiam, nullius conditionis
non haberet potestatem⁴.*

³ Sueton.
Galb. c. 5.

*Hoc tantum sciat, sibi, si hujus vindictis cesserit, conditionem filiae
quaerendam esse⁵.*

⁴ Nep. in Attico, c. 12.

⁵ Liv. III. 45.

*Quam conditionem cum obstinate propositam videret mulier sapiens⁶.
Conventa Conditio dicebatur, cum primus Sermo de Nuptiis et earum
Conditione habebatur⁷.*

⁶ Apul. Apolog.

⁷ Festus.

POWER of the FATHER.

Grotius II. 5.

Pufendorf. VI. 2.

Ascanius Clementinus de Patria Potestate. Francof.
1572. 8. et *Tr. Tr.*

Sebastian Monticulus. Tr. Tr.

Phil. Paschalis de Viribus Patriae Potestatis. Vratiss.
1672. *Fol.*

Abr. a Kerkraad de Patrio Jure. Ultraj. 1708. 8.

Cujac. Observ. VI. 17. X. 16.

*See pag. 262.

THE second Society or Domestic Relation^{*} is that which subsists between FATHER and SON. This indeed is properly the Result, the End and Intention of the Last, and consequently, in a natural View, and in regard to the Scheme of Providence, which has consulted in it the Perpetuity of Mankind, may be included in that Contemplation: but, in the Operation of Law, it must be considered also as a new Relation between a new Set of People (I call both Parties new for the Purpose I am concerned in, however the Relation certainly is so) and therefore requires a distinct Speculation.

That Consideration will be abundantly satisfied, if in the following Papers I shall point out the Obligations on either part of this Relation, *viz.* what is owing from the Father to the Son, and *v. v.* from the Son to the Father, and so establish what is meant by the Power or Authority of the Latter.

It may be asked, how I come to make this a *threefold* Consideration: to which I answer, it could not well be otherwise. For Societies are not all of one Complexion. Some there are, where all the Members of the Constitution, and all that contribute to compose it, are nearly or altogether upon an equal Footing, as in *Brotherhoods, Friendships, Partnerships in Trade, Leagues of Amity* between People and People, and such like. And here nothing is to be considered but the mutual and reciprocal Obligations on both sides. Others again admit of Excess or Inaequa-

*Grot. I. 1. 3. lity² as those of *King and Subject, Father and Children*, etc. Where the

Jus Reſtorium ſtands like the Real Difference, or Ballance of an Account, and muſt be eſteem'd a diſtinct Sum with its own proper Predicaments, Regards, and Conſiderations.

The ſame indeed might have been obſerved of that Society alſo which I was laſt conſidering : where no body can diſpute on which ſide the Ballance of Power is given. But, *As* I would have it conſidered, and as I actually did conſider it, in the light of a fine Paſſage from *Plutarch*³; *As* the Diſproportion between the two Conſtituents, was rather what we call the *Turn of the Scale*; and particularly, *As* I would avoid any Inſinuations of Sovereignty and Empire, where ſo much depends upon Harmony and Equality, I rather left my Reader, to make his own Concluſions; being unwilling to point out the Limits of a Right or Authority, which it may be proper to ſuggeſt, but perhaps too delicate to deſcribe; and is always more happily imagined, than exerted.

The Relation therefore between Father and Son, with the Obligations ariſing from it, is one of thoſe Natural Contracts which Providence has laid out for us in common with many of its Creatures: An Allotment which all the Species have, in one Branch of it at leaſt, ſubmitted to in their Turns, not by any Concurrence of their own, nor by any poſitive Appointment of others: A Diſtribution or a Sorting of Mankind, which We naturally fell into, before We had Reason or Experience to act for ourſelves, and have univerſally juſtified the Expediency and Neceſſity of it, after We had.

For, according to the System of Nature, her Work had been imperfect, and the Deſigns of Providence defeated, if Men and Animals had ſtopt ſhort at Production; if They had been content to Breed, without the leaſt Concern for Supporting; and Infancy with all its Weakneſſes, Wants, and Imperfections, had been left to ſhift for itſelf. And accordingly We find theſe two Conſiderations ſcarce ever diſunited.

Haec inter ſe congruere non poſſunt, ut Natura et procreari vellet, et diligere procreatos non curaret⁴.

Commune Animantium omnium eſt conjunctionis appetitus, et cura quaedam eorum quae procreata ſunt⁵.

Providence therefore, in both Species, in that of Animals, as well as Men, has aſſigned this Care, which I call Education, to thoſe Natural Trustees, the ſecondary Authors of each reſpective Being; has entailed the Duties of Suſtenance, Tenderneſs, and Preſervation on the Producer, and ſtipulated (in the Human Species at leaſt) for the gracious Returns of Duty, Homage, and Reſpect on the Part of the Offspring: a Covenant, where Nature herſelf by the moſt tender Feelings, and the moſt lively Touches of our Conſtitution; by what is called Parental Affection on the one hand, and Filial Piety on the other; ſeems in great measure to ſtand bound for the Performance.

We

⁴ Cic. III. de Fin. 10. Add. I. de Offic. 3. C. 5. 13. 1. 5. 6. 61. 8. 5.

⁵ Cic. I. Offic.

We have had occasion more than once to contemplate these Footsteps of Providence, which led us to a Consideration of what is called the Law of Nature, the *Lex Promiscua*, or *Lex Omnibus Animantibus communis*. This, as I observed, consisted in two Points, the One, of securing the Person of the Individual, the Other, of contributing to carry on that Perpetuity, which being denied to Individuals, is yet plainly supported in that of the Species.

* Aristot. I.
Oecon. 3.

Φύσις ἀναπληροῖ ταύτη τῇ περιόδῳ τὸ αἰεὶ εἶναι. ἐπεὶ κατ' ἀριθμὸν ἔδύναται, ἀλλάγε κατὰ τὸ εἶδος.*

† Diod. Sicul.
II. 50. Add.
D. 50. 16. 220,
ult.
C. 6. 58. 14.
Nov. 22. pr.

Ἀγαθὴ γὰρ ἡ Φύσις διδάσκαλος ἅπασιν τοῖς ζώοις ἐς πρὸς διατήρησιν ἢ μόνον ἑαυτῶν, ἀλλὰ καὶ τῶν γεννωμένων, διὰ τῆς συγγενεῖς φιλοζωίας τὰς διαδοχὰς εἰς αἰδῖον ἄγιστα διαμονῆς κύκλον.†

Now this Effort of Nature, as I was observing, is not only maintained by bringing into the System such Beings, as are to take our Places, but also by carrying them through the State of Impotence into that of Self-Support and Sufficiency. And accordingly the Impressions for this Purpose are very lively and very extraordinary, throughout the Animal System, yet many Philosophers, who have been Fathers also, have thought it no Derogation to the Human Species, when, in examining the Sense and Spirit of these Parental Influences, They have given the Preference to those which stimulate the lower part of Animal Life, the Creatures that partake of the same common Nature with us.

Καθόλου γὰρ ἡ πρὸς τὰ ἔργονα φιλοσοργία καὶ τὰ τολμηρὰ δειλὰ ποιεῖ, καὶ φιλόπονα τὰ ράθυμα, καὶ φειδῶλα τὰ γαστρίμαργα. Καὶ ὥσπερ ἡ Ομηρικὴ ὄρνις προσφέρει τὰς νεοττοῖς

Μάσακ' ἐπεὶ κε λάβῃσι, κακῶς δέ τε οἱ πέλει αὐτῇ,

‡ Plutarch de
Amore Prol.

τῷ γὰρ αὐτῆς τρέφει λιμῷ τὰ ἔργονα, καὶ τὴν τροφήν τῆς γαστρὸς ἀπλομένην ἀποκρατεῖ καὶ πιέζει τῷ σῶματι, μὴ λάβῃ καταπιῦσα. §

And a little below :

Κυνέας δὲ καὶ δρακοντίας, ἀνὰ περὶ αὐτῶν φοβηθῶσι, φεύγουσι [Gallinae], ἀνὰ δὲ περὶ τῶν τέκνων, ἀμύνονται καὶ διαμάχονται ΠΑΡΑ ΔΤΝΑΜΙΝ. ||

* *Natura hoc periodo immortalitatem adipiscitur. Specie nimirum, cum Numero non possit.*

† *Natura enim optima cunctis Animantibus, non ad sui tantum, sed et sobolis conservationem, dux est et magistra, insito vivendi amore ad perpetuum durationis orbem suae propagationem speciei extendens.*

§ *In universum enim Amor Prolis animalia audacia reddit timida, et de segnis industria, ac de gulosis parca. Sic Homeric illa Avis pullis tradit*

Escae quicquid habet, male sit sibi quamlibet ipsi :

ℓ *Sua enim ipsius fame pullos alit, cibumque jam ventri appropinquantem abstinat, et ore premit ne imprudens deglutiat.*

|| *Canes et Angues fugiunt, cum sibi metuunt, cum vero pullis timent, defendunt, et ultra quam vires patiantur, iis propulsantis certant.*

But it has been often asked, and it shall be my Business here to inquire, for here it seems to be most proper, in what Sense the Returns of Filial Piety in our Children, and the reciprocal Affection which We expect to find, and generally meet with, can be called a *Natural Duty*, or a Dictate of the Law of Nature, upon the Principle of these Considerations. For take it thus: We gather from that Experience which instructs us within, and from that Observation which is furnished us from without, that Animal Life in most of the Circumstances before-mentioned, is with us as with the other Parts of that System: That *like them* We feel a ready Disposition to guard our Existence, and secure our Persons from Pain and Violence; *like them* We are prompted to raise up others to succeed in our Likeness; *like them* again to feel for the Insufficiency of those Productions, and provide for their Security. But here our Guide leaves us to find our way by ourselves, and that Natural Light, the Light of Instinct, becomes quite extinguished. For in Animals this Affection is but seldom reflected back, or but faintly at the best: And with them the Seeds of Parental Kindness are generally sown in such unfaithful Ground, that They are never taught to look for the Harvest of Filial Gratitude.

For what *Philo* says upon this Head⁹, is not true :

⁹ T. II. pag. 200.

Μιμηταὶ θηρίων ἐνίων ἄνθρωποι γίνεσθε. Τὲς ὠφελήκοτας ἀντὶ ὧν ἐκεῖνα οἶδε καὶ πεπαιδευταί *.

Any more than the Position of that Author, who has taken upon himself the goodly name of *Demosthenes* ¹,

¹ I. c. Aristogit. pag. 487. T. III. Ed. Cant.

Τὸν τῆς φύσεως διασώζει νόμον, ὃς καὶ ἀνθρώποις καὶ θηρίοις εἰς ὃ αὐτὸς ἅπασιν ὠρεται, ΣΤΕΡΓΕΙΝ ΤΟΤΕ ΓΟΝΕΙΣ †.

The Instance of the Stork, which is often brought for the Support of that Opinion, is a Proof against it.

Of them it is said by *Philo* ²,

² I. c.

Αὐτοδιδάκτῳ τῇ φύσει νεοττοροφθέντες γηροροφῶσι χαίροντες §.

And hence the noted Proverb Ἀντιπελαργεῖν. See more in *Philo* ³, *Aristotle* ⁴, *Plato* ⁵, *Plutarch* ⁶, *Origen* ⁷, *Ambrosius* ⁸, *Suidas* ⁹.

³ I. c.

⁴ IX. H. A. 13.

⁵ Alcibiad.

l. 1. fin. et IV.

de Legg.

⁶ De Solert.

Anim.

⁷ c. Celf. l. 4.

p. 228.

⁸ in Hexaem.

l. 5.

⁹ V. Ἀντιπελαργεῖν.

The Stork, the Emblem of true Piety.

Because when Age hath seiz'd upon her Dam,

And made unfit for Flight, the grateful young One

Takes her upon his Back, provides her Food,

Repaying so her tender Care of him,

Ere he was fit to fly, by bearing Her ¹.

* Homines, estote imitatores quorundam Animalium. Ea norunt et instituantur remunerare bene-meritos.

† Naturae legem tuetur, quae una et hominibus et brutis definitur, sc. Parentes diligere.

§ [Ciconiae] a natura edoctae, in prima aetate a parentibus educatae, eorum senectutem magnam alacritate fovant.

¹ Beaum. and Fletch. Spanish Curate.

² pag. 113. To which should be added that remarkable Passage of *Aristophanes* produced above ².

But be it observed, that in Disquisitions about the Rules and Directions of Nature, all safe Conclusions must be drawn from the constant Phaenomena which She exhibits, not the uncommon ones, the accidental, and the extraordinary. The foregoing Testimonies therefore, with all the Weight we are willing to allow them, and I allow them all they ask, serve to constitute, not a Rule, but an Exception. The Blaze of the Proverb reflects from the Individual, not the Species: nor would the Observation have been worth Recording, if the Stork had this Property in common with all other Members of the Brute Creation. It was the wise Man ³ that sent his Sluggard to the Ant, for the natural Lessons of Industry: As others have done after him,

Sicut

*Parvula, nam exemplo est, magni Formica laboris,
Ore trahit quodcunque potest, atque addit acervo
Quem struit, haud ignara ac non incauta futuri⁴.*

⁴ Hor. 1. Sat. I.
32.

But does not the same Lecture give us leave to apprehend, that (this little Insect excepted) the rest of the innumerable Tribe of Animals, though largely endowed with Sense and Appetite, yet, with the Vegetable World, with the *Lilies of the Field*, neither *toil* nor *spin*, nor cast away a Thought for To-morrow ⁵?

⁵ Matth. VI.
28.

Supposing it therefore to be uniform in Experience, and true in Philosophy, that Man is linked with his Fellow Creatures, in raising up a Succession, and then supporting their Education; yet the same Experience informs us, that these Impressions last with us, when they are worn down with them: that after a certain Period, every Animal in the System becomes forgetful of these Sensations, and is *hardned against her young Ones, as though they were not her's*⁶. But Human Relations on the other hand are not only founded in Property of Blood, but cemented by a long Series of Friendship, the Endearments of a Rational Society, and the standing Monuments of repeated and reciprocal Obligations. And this, I say, is visible not only in the Continuance of the Fatherly Affection beyond the Date which the Brute Creation want it for; but moreover, in those Strains of Filial Piety, which the rest of the Creation, (a very few Instances excepted) are perfect strangers to; or at least, if they have it, carry but faint and very imperfect marks of it about them. This has led some to distinguish between *Jus Naturae* and *Jus Gentium*, as if the former were the Law of Nature, common to all the Animal Creation; the other, the Law of Nature peculiar to the Human Circumstance and Condition: and which seems to be the Apprehension of the elder Lawyers:

⁷ D. I. I. I. 4.

VLPIAN⁷. *Jus Gentium, quo Gentes humanae utuntur; quod a Naturali recedere, facile intelligere licet: quia illud omnibus animalibus, hoc solis hominibus inter se commune sit.*

To

To which *Tribonian* has added these Instances from

POMPONIUS¹. *Veluti erga Deum Religio, ut Parentibus et Patriae* ¹ 2. eod. *pareamus.*

Others again are willing to distinguish (which amounts to much the same Distinction with the last) between the *Jus-Naturae Corporis*, and the *Jus-Naturae Animi*: Making *That*, to be the Promiscuous Universal Law, which not only lies upon us, but involves all such Beings, as are made up of organized and animated Bodies, also: *This*, the Proper and Peculiar Law of a Rational Nature, of a Being endowed with the Faculties of Thinking and Reflection. And in this last Consideration, say they, the Notion of Filial Piety is included.

This Duty seems indeed, as I have already observed, to be peculiar to our Natures: The Brute Creation have the Measures and Meanings of their System fulfill'd without it. And accordingly those *Stimuli* of our Constitution, those *Cords of the Man*, the Powers and Arguments of Nature, the *Bands of Love*², and the Principles of Natural Friendship, all those Internal Feelings that season this Duty, and recommend it, are imparted to our Texture, and not to theirs: for the best and wisest Purposes, without all question. ² Hof. XI. 4.

Philosophers have sometimes been apt to confound the Impressions of Nature with the Apprehensions of Duty; to blend Physics with Morality³, and call those Actions, the Operation of Law, which the Frame of our Constitution is often prompting us to exert. But Morality is not seated in these Tendencies of our Nature, but supported indeed and encouraged greatly by them. There is no Moral Obligation, where there is no Reason to direct it. Nor do I by this dispute, but that many Virtues which look bright, and sparkle in the List of moral Duties, received their first glow from the Warmth of Instinct: and this Principle of Filial Piety among the rest, like a Rock-work of Nature, till Humanity, and the Sense of Gratitude, gave it the Polish and Lustre of a Rational Duty. ³ Above pag. 121.

If I was asked, why I apprehend that these Affections should cling to *our* Natures, and not to *theirs*; why in the animal System, the *Parental* Tenderness should dye away into Forgetfulness; and again, why the *Filial* is seldom observed to have existed at all: I answer; Because the Period of the Former seems to be abundantly sufficient for those purposes, for which it was imparted: and, on the Other hand, the Returns of Gratitude in the Offspring (which is our principal and more immediate Subject) are neither wanted nor expected.

For let us but consider: The Succour and Support of old Age in Animals (where these reciprocal Affections would have their best use) seems regularly to devolve upon their Owners and Proprietors; upon such as have availed themselves of the Strength, or any other Excellence of those Creatures, during the Period of their Perfection. It is but equitable

A a a

that

that the Burden should follow the Emolument. And this has been one Suggestion in favour of that Dominion, which some People of Antiquity, not to mention the Moderns, have exercised over their own Species, as so many Head of Cattle :

Senes ut in ocia tuta recedant.

This Maintenance therefore, I consider as a sort of Tax upon Property and Dominion. I never remember to have seen this Principle accurately examined : but upon the whole, both Reason and Good Nature sufficiently direct us to provide a Sustenance for the Infirmary of those Creatures, to whose Sagacity, Strength, or Swiftnefs, We may have sometimes been so largely indebted for our own.

² vit. Caton.
Major.

There is a Passage in *Plutarch*² very much to this purpose. And because a long Greek Quotation, like many possibly that have gone before, may escape the Attention of some of my Readers, I will give it in the best Translation I am able, because it may engage (I am satisfied, it deserves) the Notice of Many, who might be tempted to pass it over.

“ *Cato* himself owned, that He never wore a Suit of Cloaths above three Pound price.—And once being possessed of a rich Set of Hangings, which fell to him by Inheritance, he immediately sold them. “ There was not the least Stucco in any of his Villas ; and no Slave ever “ stood him in more than fifty Pieces, as he did not want the delicate “ and sprucer sort, but the coarse, and the plain, and such as would be “ of use to him in his Country Employments. And these too, when “ they grew old and useless, He thought it his Duty to dispose of to the “ best bidder, rather than be at the unnecessary expence of maintaining “ a number of unprofitable Hands. In short, he thought nothing could “ be cheap in any degree, that was superfluous. And when He made “ any Purchase, it was always Arable and Pasture, and for the purposes “ of Husbandry : for he had no Notion of Slopes or Vistas.

“ Some imputed this to the Nearness of his Temper, and the contracted Notions of Thrift and Parsimony : Others again were of “ Opinion, that all this was a Violence done to his own natural Disposition, in order to shew a good example of Frugality, which was “ at that time much out of fashion. But I must needs say, that so “ unnatural a Treatment of his Slaves, whom He could consider as so “ many Head of Cattle, and could persuade himself to turn into as much “ Cash as he was able, when they grew old and past their Labour ; This, “ I say, was certainly a mark of a very sordid Temper, to say no worse, “ and became the mean Spirit of one, who had got no more Humanity “ about him, than to think that the Value of all the Intercourse and “ Communications between Mankind, was to be rated by the use that “ one Man was able to make of another. But what a larger Field has “ Good-Nature to display itself in, than common and ordinary Justice !
For

" For We can only make use of Law and Right in our dealings with
 " our own Species : but Tendernefs, Compassion, and Beneficence can
 " be extended to the Brute Creation. For these Principles spring from
 " that unexhausted Fountain, whose Streams are never dry ; the Foun-
 " tain of Good-Nature and Generosity. A good-natured Man will
 " think himself obliged to give his Horses, when they are past service,
 " the free use of his Pastures ; and when his Dogs can run no longer, to
 " find them a warm Kennel, and what is necessary for their Support.
 " While the People of Athens were building their Hundred-Foot [*a*
 " *Temple that went by that name*], whenever they observed any of the
 " Mules to have gone through a good deal of hard Service, they took
 " them out of the Harness, and turned them loose into Pasture. It is
 " reported of One of these, that it was her Practice to go down to the
 " Wharf of her own accord, and when the Carriages were drawing up
 " the Hill, She would go along-side the Team, or lead the way, just as it
 " suited best ; as if She was encouraging the Cattle, and had taken up the
 " Business of the Driver. Upon which occasion, this Mule by a Decree of
 " the State was maintained at the public Expence as long as she lived.
 " When *Cimon* dyed, his Horses, which won for him thrice the Prize at
 " the Olympic Games, were buried by him, and their Monuments are
 " to be seen near His. There are several Instances upon Record of the Fi-
 " delity which Dogs have shewn towards their Masters. During the Per-
 " sian War, when the Athenians by general Consent left their City, and
 " went over to Salamis, *Xanthippus*, a Person of Note at that time, had
 " a faithful Dog that would not be left behind, but swam by the side of
 " the Vessel his Master was a-board of : so that afterwards he gave him
 " a kind of a Funeral upon a little rising Ground, which took its Name
 " from that Circumstance, and is called *Cynossena* [*the Dog's Burying-*
 " *place*] to this very Day. Animals have doubtless a Title to some more
 " regard than our old Shoes, or useless Furniture ; We are not to shake
 " them off, when they are cut through, or broke down with Service : but
 " these are Circumstances, where We should study a gentle and mild Be-
 " haviour, if for no other reason, at least for the sake of using ourselves
 " to the Practice. Far be it therefore from me to sell an old Ox, that
 " has plowed my Ground in the Days of his Strength, much less would
 " I part with, for the sake of a little dirty Lucre, what would be as use-
 " less to the Buyer, as he was to me, an old Slave of my own Species ; and
 " transport him, as it were, in the Decline of Life, out of a House and
 " Family, that had been almost natural to him for so many Years past.
 " But *Cato*, as if He was too high for these Sensations, used to make his
 " Boast, that when he returned from Spain, he left an old Horse behind
 " him, a Horse that had carried him all his Campaigns ; and that for no
 " other reason, than because He was not willing to put the Public to
 " the Expence of his Freight. But whether this was an Instance of a
 " great Soul or a little one, my Reader must judge for himself."

Thus (in a free Translation) writes that most incomparable Author, where I cannot offer one Observation, but what makes greatly for his Credit. For let us but observe (1). That Vein of Good-Nature which runs through the whole, and mixes with his good Sense in every Part of the way : (2). The Justness of that Reflexion, when He considers the Acts of Beneficence, Mercy, and Kindness, as infinitely more extensive, than the rigorous Course of Justice, that has its Boundaries set (as He properly observes) which it cannot pass, but must run for ever in the narrow Channel of Right, of Law, of Faith, and of Con-

³ H.de Ira 27. tract : Agreeable to those Words of Seneca³,

Quanto latius patet Officiorum, quam Juris Regula? Quam multa Pietas, Liberalitas, Humanitas, Justitia, Fides exigunt, quae omnia extra publicas tabulas sunt?

(3). That almost Christian Sentiment which compares the Spring of Charity and Good-Nature to a Well of living Water, whence Thousands may supply their Wants, and *To-morrow shall be as this Day, and*
⁴Isai.LVI.12. *more abundant* : And (4.) lastly, a great Judgment of Mankind, discovered in a thorough Sense of the Prevalence of Habit and the Weight of Practice ; and then the Force of the Observation directed, with a great Generosity of Temper, to the best Sentiments of our Nature, and the most godlike Part of our Constitution ; exhorting us *to practise an Habit of Good-Nature*, even in Matters of less Regard and Importance, *μελέτης ἕνεκα τῆς φιλανθρωπίας*. Words never to be forgotten, and never to be studied or admired too much.

I was observing therefore, that these natural Affections in the Human Species, contrary to what We observe in the rest, seem to be rivetted in our Constitution, because they may one Day or other have occasion to be exerted. For it is not only the Expectation of most *Civil* Communities, to be discharged of supporting Those, whom Age and Infirmities have render'd useless and burdensome, and to cast this Consideration upon their Descendants, if their Condition of Life can justify it ; but it is held by all the good Writers, to be a *Natural* Duty also.

But if it be asked, upon what Principle in Nature this is founded (for the Reason, say They, abates, which cast this Charge upon the Father, viz. *Who is bound for the Nurture of his Child, as He was the Author of his Existence.*) To this I answer, That Nature pleads as strong in the one Case as in the other, *intuitu Vitae Acceptae*, as it did, *intuitu Vitae Datae*. And this is the Language of the Books :

Parens quamvis ali a Filio ratione naturali debeat, tamen aes alienum ejus non esse cogendum exsolvere filium, rescriptum est⁵.

⁵ D. 25. 3. 5.
16.

Si Impubes sit Filius emancipatus, patrem inopem alere cogetur. Iniquissimum enim quis merito dixerit, Patrem egere, cum Filius sit in facultatibus⁶.

⁶ § 13. eod.

Si

*Si vel Parens neget filium, idcircoque alere se non debere contendat; vel Filius neget parentem, summam judices oportet super ea re cognoscere. Si constiterit filium vel parentem esse, tunc alijubebunt*⁷. ⁷ § 8. eod.

*Parentum necessitatibus liberos succurere justum est*⁸.

⁸ C. 5. 25. 1.

*Competens Judex a filio te alijubebit, si in ea facultate est, ut tibi alimenta praeferre possit*⁹.

⁹ l. 2. eod.

*Ipsam autem Filium vel Filiam, Filios vel Filias, et deinceps, alere patri necesse est, non propter hereditates, sed propter ipsam naturam, et leges, quae et a parentibus alendos esse liberos imperaverunt, et ab ipsis liberis parentes, si inopia ex utraque parte vertitur*¹.

¹ C. 6. 61. 8. 5.

Some Writers resolve this into that [imperfect]² natural Right, which is known by the name of Gratitude or Remuneration. For which this Law has been often quoted³:

² Above, pag. 86.

³ D. 5. 3 25. 11.

— *Nec si donaverint, locupletiores facti videbuntur: quamvis ad remunerandum sibi aliquem naturaliter obligaverunt.*

Others found it upon a Maxim, viz.

Quod Juris est in uno Relatorum, idem esse censetur in altero:

According to that Rule of Law⁴,

⁴ D. 50. 17. 41. pr.

Non debet Aetori licere, quod Reo non permittitur.

Which may prove it a Duty in Civil Law, but not in that of Nature.

To proceed: The Civilians have agreed to reduce these Obligations in some measure, to a System; and to regulate and adjust the Proportions throughout the whole Process and Administration of them. Thus: the strictest and most immediate of these Duties, say they, is the Maintenance of our Children, whose natural Imbecillity calls for a Support from some Quarter: and Reason and Affection points out from which. And in order to ascertain by Rule, when Cases came to be put, and Difficulties arise on this Head; as, for instance, whether the greater Obligation lies upon the Father or Grandfather, and so on, upwards: Whether a greater Consideration ought to be had of the Son or Grandson, and so downwards, in the Scale of Descendants: All these, and many such may be decided by one general Maxim, that the *Ratio Alimentandi* is to be ascertained in all Cases by the *Ratio of Proximity*, as well in the Persons Supporting, as those that are Supported. As in the following Instance.

The next Place in order is given to the *Jus Reciprocationis*, or that Duty, which is incumbent upon Children to ease and support the Age of those, that gave them Life, and the Means of doing it. Where also the Case of the Father has the Preference of the Grandfather's, by reason of that Proximity I just now mentioned.

There is thirdly a Duty of this sort between Brethren, the Issue of a common Parentage: but much fainter than either of the foregoing, and
rather

rather supported by Humanity and Tendernefs, than what can be called Right or Obligation, in any sense of the Words. Though some Writers put it higher⁵.

⁵ D. 27. 2. 4. Many other Cafes of Alimony are produced, as Questions relating to Time, and Duration⁶, Quantity⁷, the Circumstances and Conditions of the Parties in difpute⁸: what fhall be deemed Aliments: what Provision was required in the Roman Law for Natural Children, properly fo called: what for the *Adulterini*, *Inceftuofi*, *Vulgo Quaeſiti*⁹, with many more Difquifitions of the like Nature.

⁶ D. 34. 1. 14. 1. to Time, and Duration⁶, Quantity⁷, the Circumstances and Conditions of the Parties in difpute⁸: what fhall be deemed Aliments: what Provision was required in the Roman Law for Natural Children, properly fo called: what for the *Adulterini*, *Inceftuofi*, *Vulgo Quaeſiti*⁹, with many more Difquifitions of the like Nature.

⁷ C. 5. 25. 3. and 4. This Duty of ſuſtaining the old Age, the Diſtreſſes, and Infirmities of our Parents, is fo vigorouſly maintained by the Civil Law, that the Neglect of it has been looked upon as a juſt Cauſe of Diſheriſon¹. The following Record has its Merit:

⁸ D. 25. 3. 5. 7. Arg. D. 26. 7. 13. pr.

⁹ C. 5. 27. 8. Authent. 5. 5. 6. Authent. Ex complexu.

¹ C. 1. 4. 28. Authent. Nov. 115. 3. 12.

² Hadrian. Imp. Refcript. 39.

ΑΙΤΥΝΤΟΣ ΤΙΝΟΣ ΠΕΡΙ ΙΔΙΑΣ ΟΥΣ, ΟΤΙ ΑΥΤΟΝ ΗΜΕΛΕΙ ΑΣΘΕΝΕΨΑΙ ΚΑΙ ΠΕΝΕΜΕΝΟΝ, ΚΑΙ ΤΡΕΦΕΙΝ ΜΗ ΘΕΛΕΙ. ΕΝ Ω ΑΠΑΝΤΑΣ ΤΑΣ ΎΣΙΑΣ ΑΥΤΩ ΔΕΔΑΠΑΝΗΚΕΙ. ΑΔΡΙΑΝΟΣ ΕΙΠΕΝ ΤΩ ΝΕΑΝΙΣΚΩ, ΦΥΛΑΣΣΕ ΤΟΝ ΠΑΤΕΡΑ ΣΗ, ΔΙΑ ΤΩΤΟ ΓΑΡ ΣΕ ΕΓΕΝΝΗΣΕΝ ΚΑΙ ΦΡΟΝΙΣΟΝ ΕΝ, ΜΗ ΠΑΛΙΝ ΠΕΡΙ ΣΩ ΠΡΟΣ ΜΕ ΜΕΜΨΗΛΑΙ.*

The ancient Hiſtory is full of this great Principle. There is one very remarkable, which I ſhall give in the Words of *Valerius Maximus*³, chiefly for the ſake of that fine Obſervation, with which He closes his Account of it:

³ V. 4. 7.

Sanguinis ingenui mulierem Praetor apud tribunal suum capitalicrimine damnatam Triumviro in carcere necandum tradidit. Quo receptam, is, qui custodiae praeerat, misericordia motus, non protinus strangulavit. Aditum quoque ad eam Filiae, sed diligenter excussae, ne quid cibi inferret, dedit, existimans futurum, ut inedia consumeretur. Cum autem jam dies plures intercederent, curiosius observata filia, animadvertit illam exerto ubere famem matris lactis sui subsidio lenientem. Quae tam admirabilis spectaculi novitas ab ipso ad Triumvirum, a Triumviro ad Praetorem, a Praetore ad Concilium Judicum perlata, remissionem poenae mulieri impetravit. Quo non penetrat, aut quid non excogitat Pietas, quae in carcere servandae Genetricis novam rationem invenit? Quid enim tam inusitatum, quid tam inauditum, quam Matrem Natae uberibus alitam! Putaret aliquis hoc CONTRA rerum NATVRAM factum, nisi diligere Parentes prima NATVRAE LEX esset.

This affecting Story has been handed down to Posterity, at least one very like it, by the Name of the ROMAN CHARITY. It should rather have been the ROMAN PIETY. For it has been the Practice of all Wri-

* Postulante quodam de suo filio, quoniam eum negligeret valetudine mala utentem, et inopem, neque alere vellet, in quo omnes suas facultates consumpsisset, Hadrianus dixit Juveni: Custodi patrem tuum, ideo enim te genuit: et cura praeterea ne istorum apud me de te queratur.

ters whatsoever, Sacred ⁴as well as Profane, to measure out, with a surprising Uniformity, the Reverence that is due to our respective Natural Parents, by the same Expression (that of PIETY or ΕΥΣΕΒΕΙΑ) with which They set out our Duty to the Author of Nature, and the common Parent of Mankind. Whether it be, that from our Earthly Parents We may in some sense be said *to live and move and have our Beings*⁵; ¹A&.XXVII. as is written of the Other, in a more exalted one: Whether because ²⁸ We are fashioned, by a secret, but uniform, Operation of Nature, in *their Image, and their Likeness*⁶: Whether it be from considering that ⁶Gen. I. 26. natural Instinct, which like a Substitute of Providence, unseen and unfelt, watches over the Impotence of Childhood, and with a Fore-cast too, like that of Providence, plans out the comfortable Situation of our future Fortunes: or lastly, Whether We may look upon them, as *Gods to go before us*⁷, to mark out the Distinctions of Good and Evil, ⁷Exod. XXXII. 1. a *Lantern to our Feet, and a Light to our Path*⁸. ⁸Psal. CXIX. 105.

However Authors may disagree about some minute Circumstances of the former Story, whether this Act of Duty was exhibited to a Father or a Mother⁹, it is to be considered, as an Expression of that Virtue, which all good Writers, as I observed, have agreed to call by the emphatical Name of PIETY. So of this very Event:

*Pietati aedem ab Acilio consecratam aiunt eo loco quo quondam Mulier habitaverit, quae Patrem suum inclusum carcere mammis suis clam aluerit: ob hoc factum Impunitas ei concessa est*¹,

Virgil, in conformity to the ancient Manner, and the Taste of the Heroic Age, constantly distinguishes his Hero, with a kind of *Agnomen*, or Characteristic, which was PIVS AENEAS. Let me, upon this Occasion, introduce this little Passage from *AElian*².

Ο δὲ τὸν πατέρα πάνυ σφόδρα γεγηρακότα ἀναβήμενος ἄμοις ἔφερεν. Ὑπερ-
εκπλαγύνες ἔν κ' ἐπὶ τέτρω ἔχ' ἡκιστα, πάντων αὐτῷ τῶν οἰκείων κλημάτων
ἀπέστησαν, ὁμολογῆσαι, ὅτι πρὸς τὴν ΕΥΣΕΒΕΙΑΝ τῶν ἀνθρώπων, κ'
τὴν Θεὸς κ' τὴν γειναμένους δι' αἰδῶς ἀγούσας, κ' οἱ φύσει πολέμιοι ἡμεροὶ
γίνονται.*

And upon a like Occasion, *Apollo* had the same Appellation,

*Quam PIVS Arcitenens oras et litora circum
Errantem, Gyro celsa Myconoque revinxit*³,

according to *Servius*, *Bene Pius, qui ultus est matrem*⁴.

There was also a SICILIAN PIETY, which like the Roman, is varied by the old Writers in almost every Circumstance. The Number of the People concerned, their Names, Time, and every thing but Place, are

* Ille vero patrem prorsus senio confectum humeris impositum ferebat. Obscurescentes igitur etiam hoc facto non minimum, et omnibus suis bonis cesserunt: declarantes ita, erga pios homines, qui Deos et Parentes reverenter colunt, etiam natura inimicos fieri mites.

³ Virg. III.
Aen. 75.
⁴ l. c.

Orat. c. Leo-
crat. § 23.

c. 5.

differently recorded. The Story is worth reading in *Lycurgus*⁵, and those Authors I have quoted in my Edition of him. However here it follows from *Solinus*⁶,

Inter Catanam et Syracusas certamen est de illustrium fratrum memoria, quorum nomina sibi diversae partes adoptant. Si Catanenses audiamus, Anapius fuit et Amphinomus, si, quod malunt Syracusae, Emantium putabimus et Critonem. Catanensis tamen Regio causam dedit facto, in quam se quum incendia Aetnae protulissent, Juvenes duo sublato parentes evexerunt inter flammam illaesi ignibus. Horum memoriam ita Posteritas munerata est, ut sepulchri locus nominaretur CAMPVS PIORVM.

v. 620.

To which let me add the Account by *Corn. Severius*, in his Poem upon Mount *Aetna*⁷:

*Haec nullis parsura incendia pascunt,
Vel solis parsura Piis. Namque optima proles,
Amphinomus Fraterque pari sub pondere fortes,
Cum jam vicinis streperent incendia tectis,
Adspiciunt pigrumque patrem, matremque, senecta
Eheu defessos, posuisse in limine membra.
Parcite avara manus dites attollere praedas;
Illis divitiae solae materque paterque.
Hanc rapiunt praedam, mediumque exire per ignem,
Ipso dante fidem, properant. O maxima rerum,
Et merito Pietas homini tutissima Virtus!
Erubere pios juvenes attingere flammae,
Et quacunque ferunt illi vestigia, cedunt.
Felix illa dies, illa est innoxia terrae.
Dextera saeva tenent, laevaue incendia fervent.
Ille per obliquos ignes, fraterque triumphant,
Tutus uterque pio sub pondere, suffugit illac,
Et circa geminos avidus sibi temperat ignis.
Incolumes abeunt tandem, et sua Numina secum
Salva ferunt. Illos mirantur carmina vatū:
Illos seposuit claro sub nomine Ditis,
Nec sanctos juvenes attingunt sordida fata,
Sed vere cessere domus et jura Piorum.*

I shall not scruple to add these Verses of *Claudian* upon the same Subject, because They were made to describe a Medal of the *Catanenses*, which I have subjoined; and I think I never remember Poetry and Sculpture (if I may so call it) reflect a stronger Light upon each other.

*Aspice sudantes venerando pondere fratres,
Divino meritis semper honore coli.
Iusta quibus rapidae cessit reverentia flammae,
Et mirata vagas reppulit Aetna faces.*

Complexi

Complexi manibus fultos cervice parentes,
 Vt tollant vultus, accelerentque gradus.
 Grandaevi gemina sublimes prole feruntur,
 Et cara natos implicuere mora.
 Nonne vides, ut saeva senex incendia monstret,
 Vt trepido genetrix invocet ore Deos!
 Erexit formido comam, perque omne metallum
 Fusus in attonito palluit ore color.
 In juvenum membris animosus cernitur horror,
 Atque oneri metuens, impavidusque sui.
 Rejeetae vento chlamydes. Dextram erigit ille,
 Contentus laeva sustinuisse patrem:
 Ast illi duplices in nodum colligit ulnas
 Cautior in Sexu debiliore labor.



To all this may be added, that the Memory of the Fact was also preserved in several other Medals of Antiquity, in some of *Sext. Pompeius*⁷, who commanded a Squadron in those Seas after the Death of his Father, and for a while gave great Trouble to *Augustus*. I do not think his Medals bear this Event, because his Fleet lay upon the Coast of *Catana*, as it is imagined; but in honour of the same Principle, which *Sextus* so remarkably exerted, in revenging the Cause and Quarrel of his Father. There is in *Morel's Thesaurus*⁸ another Coin of *Sextus*, with a fine Figure of *PIETAS* on the Reverse, which carries with it no particular Allusion to the Piety of the *Fratres Catanenses*, but doubtless to that of *Pompey's Son*.

⁷ Pedruffi
 Tom. II.
 Havercamp.
 Thes. Morell.
 in Gente Pompeia.

⁸ See Havercamp. ibid.



*Gronovius*⁹ complains that Posterity is left in the Dark, as to the Time of this Fact. *Valerius Maximus*¹ fixes it at the LXXXIst Olympiad.

B b b

It

⁹ Thes. Antiqq. Gr.
 T. II. n. 27.
¹ V. 4.

It is remarkable, that the Ancients seldom talked of this Duty without a Fervour of Devotion ; some of which Expressions, as they greatly justify the Emphasis given to it, in the Appellation of *Piety*, I shall produce at large.

Γονέων δὲ ἀμελεῖν, ἔτε θεός, ἔτε ἄνθρωπος νῦν ἔχων, ζύμβελος ποτὲ γένοιτο ἂν ὑδεῖς ὑδενί. Φρονῆσαι δὲ χρὴ περὶ θεῶν θεραπείας τοιόνδε προσίμιον ἂν γενόμενον, εἰς τὰς τῶν γεννησάντων τιμὰς τε καὶ ἀτιμίας ὀρθῶς συλειτουργούμενον. Νόμοι περὶ θεῶν ἀρχαῖοι κεῖναι παρὰ πᾶσι διχῆ. Τὸς μὲν γὰρ τῶν θεῶν ὁρῶντες σαφῶς, τιμᾶμεν τῶν δ' εἰκόνας, ἀγάλλομεθα ἰδρύσασθαι, ἔς ἡμῖν ἀγάλλομεθα καίπερ ἀψύχους ὄντας, ἐκείνους ἡγούμεθα τὸς ἐμψύχους θεῶς πολλὴν διὰ ταῦτ' εὐνοίαν καὶ χάριν ἔχειν. Πατὴρ ἔν ὧ καὶ μήτηρ, ἢ τῶν πατέρων ἢ μητέρων ἐν οἰκίᾳ κεῖναι κειμήλιοι ἀπειρηκότες γῆρας, μηδεὶς διανοηθῆτω ποτὲ ἀγαλμα αὐτῶν τοιοῦτον ἐφῆσιν ἰδρύμα ἐκ οἰκίας ἔχων, μᾶλλον κύριον εἶσθαι, εἰάν δὴ κατὰ τρόπον γε ὅρως αὐτὸ θεραπείᾳ ὁ κεκλημένους. †

¹ Plato XI. de Legg. p. 930. Ed. H. S.

² de fraterno amore.

To Plato I subjoin *Plutarch* ²,

Οἱ γε πάντες ἄλλοι — λέγουσι καὶ ἄδουσιν ὡς γονεῦσι τιμὴν μετὰ θεῶς πρώτην καὶ μεγίστην ἢ τε φύσις, ὅ, τε τὴν φύσιν σώζων νόμος ἀπέδωκε καὶ ἔκ ἐξιν ὅ, τι μᾶλλον ἄνθρωποι κεχαρισμένοι θεοῖς δρῶσιν, ἢ τοκεῦσιν αὐτῶν καὶ τροφεύσι παλαιὰς ἐπὶ νέαις δανισθείσας χάριτας εὐμενῶς καὶ προθύμως ἐκτίοντες. ἔδ' αὖ πάλιν μείζων ἐπίδειξις ἀθῆς γέγονε τῆς περὶ γονεῖς ὀλιγωρίας καὶ πλημμελείας. Διὸ τὸς μὲν ἄλλους κακῶς ποιεῖν ἀπειρήσθαι, μηδὲ αὐτὴ καὶ πατρὶ τὸ μὴ παρέχειν ἑαυτὴς δρῶντας αἰεὶ καὶ λέγοντας ἀφ' ὧν εὐφρανέσθαι, καὶ μὴ προσῆ τὸ λυπεῖν, ἀνόσιον ἡγῆται καὶ ἀθεσμον. *

Thus *Philo* writes in many Parts of his Work, that Parents are in a middle Nature between Divinity and Humanity ³.

³ T. I. p. 497. See Mangey ad T. II. pag. 199.

Μετὰ δὲ θεῶν καὶ ἀνθρωπίνης φύσεως, καὶ μετέχοντες ἀμφοῖν ⁴. †

Τῶν γονέων ἡ φύσις ἀθανάτου καὶ θνητῆς ἐσθίας τοῖς ἐν αὐτοῖς μεθεῖναι ⁵. §

⁴ Fragm. Philonis ex Cod. Baroc. n. 143. ⁵ Id. Philo T. II. p. 198.

† Parentes negligere neque Deus neque Homo sanæ mentis compos cuiquam unquam erit auctor. Quod vero de Deorum cultu sentiendum est, illud, ad legitimum parentum obsequium, velut prooemium quoddam subternendum erit. Priscæ de diis leges apud omnes homines bifariam sunt positi. Nam Deorum quidem alios videmus, eosque ita conspicabiles colimus : aliis quidem, quos videlicet videre non possumus, imagines et statuas collocamus : easque, etiam inanimatas sint, animatos tamen illos esse Deos arbitramur, et ipsos nobis se colentibus multam idcirco benevolentiam et gratiam erga nos habere, ac proinde faventes propitiosque futuros existimamus. Cujus ergo Pater aut Mater, horumve parentes senio confecti quasi thesaurus quidam domi jacent, is putet nunquam aliud tale simulacrum magisque efficax sibi affuturum domui suæ, si is qui tanto bono præditus est, illud pro merito coluerit.

* At vero reliqui omnes — hoc dicunt atque canunt, primum secundum Deos honorem ac præcipuum parentibus naturam et legem naturæ destinasse : neque diis quicquam gratius homines facere, quam si parentibus alumnisque suis veteres super novis foeneratas gratias benigne et alacriter persolvant. Neque contra majus est argumentum impietatis, quam parentum despiciat et in eos injuriæ. Itaque interdictum est nobis, ne aliis male faciamus ; matri autem et patri non ita se dare, ut semper ea dicas atque agas, quibus lætentur, etiamsi molestiam præterea nullam asferas, inpium injustumque habetur.

† [Parentes] medii inter divinam et humanam naturam, et utriusque participes.

§ Parentum Natura immortalis et mentalis Substantiæ videtur esse contermina.

And therefore the Precept of *Honouring our Parents* was placed between the First and Second Tables⁶. Like that Maxim of *Aristoxenus* the Pythagorean⁷,

⁶ Ibid.

⁷ Stob. Serm. LXXVII.

Μετὰ τὸ Θεῖον καὶ δαιμόνιον πλείστον ποιεῖσθαι λόγον γονέων τε καὶ νόμων. (||)

To proceed with *Philo* :

Τὰς ἐκ τῆ μηδ' ὅλης εἰς τὸ εἶναι παραγαγόντας, καὶ κατὰ τῆτο μιμησαμένους Θεόν, καὶ περιέπυσσι.*

⁸ T. II. p. 199.

Τῶν δ' εὐτολμοτέρων ἀποσεμνύνοντες τὸ γονέων ὄνομα φασὶ τινες, ὡς ἄρα πατὴρ καὶ μήτηρ ἐμφανεῖς εἰσὶ Θεοί⁹. †

⁹ Ibid. pag. 201.

Ἀμήχανον εὐσεβεῖσθαι τὸν ἀόρατον ὑπὸ τῶν εἰς τὰς ἐμφανεῖς καὶ ἐγγύς ὄντας ἀσεβούντων¹. §

¹ Ibid.

Thus *Menander* :

Νόμος γονεῦσιν ἰσοθέως τιμὰς νέμειν. ||

And again :

Θεὸς μέγιστος τοῖς φρονέουσιν οἱ γονεῖς. †

Hierocles, a Writer of the best Credit, has frequently such Expressions as these :

Δευτέρως καὶ ἐπιγείως τινὰς Θεός.**

Θεῶν ἡμῖν εἰκόνες. ††

Θεοὶ ἐφέστιοι καὶ εὐεργέται. §§

Θεῶν εἰκόνες βεβαιόταται. ||||

Θεοὶ ἐσιγῆχοι καὶ συνδίαιτοι. ††

So *Aristotle*²,

² IX. Ethic. 2.

Δόξειε δ' ἂν τροφῆς μὲν γονεῦσι δεῖν μάλιστα ἐπαρκεῖν, ὡς ὀφείλουσας, καὶ τοῖς αἰτίοις τῶν εἶναι κάλλιον ἢ ἑαυτοῖς εἰς ταῦτ' ἐπαρκεῖν, καὶ τιμὴν δὲ καθάπερ Θεοῖς, (*)

To the Passages produced here let me subjoin a similar one from *Valerius Maximus*³.

³ I. 1. 13.

Pari vindicta Parentum ac Deorum Violatio expianda est.

(||) *Post Deos et Daemones plurimi facere oportet Parentes atque Leges.*

* *Eos qui ex non-existentia ad existentiam produxerunt, et in ea re Deos imitati sunt, non curant.*

† *Eorum qui Parentum appellationem magnificentius enarrant, quidam dixerunt, Patrem et Matrem Deos esse manifestos.*

§ *Impossibile est ut ii pie se gerant erga Deum invisibilem, qui impie se gerunt erga praesentes [Deos] et proximiores.*

|| *Lex est ut Parentes aequali honore impertiamus ac Deos.*

‡ *Deus maximus sapientibus sunt Parentes.*

** *Secundos et terrestres Deos.*

†† *Deorum nobis Imagines.*

§§ *Dii domestici et bene-meriti.*

|||| *Deorum imagines certissimae.*

‡‡ *Dii domestici et convictores.*

(*) *Videntur autem Filii Parentibus maxime res ad victum necessarias suppeditare debere, tanquam debitores: pulchriusque est iis, per quos sumus, quam nobis ipsis in his rebus opitulari. Praeterea parentibus honos, ut Diis immortalibus, est habendus.*

³ Quæst.
Rom. 34.

And let me again add *Plutarch* ¹:

Διὰ τί τὰς γονεῖς ἐκκομίζουσιν οἱ μὲν υἱοὶ συγκεκαλυμμέναις, αἱ δὲ θυγατέρες γυμναῖς, ταῖς κεφαλαῖς, καὶ ταῖς κόμαις λελυμέναις; πότερον ὅτι τιμᾶσθαι μὲν ὑπὸ τῶν ἀρρένων δεῖ τὰς πατέρας ὡς Θεάς, πεινεῖσθαι δὲ ὑπὸ τῶν θυγατέρων, ὡς τεθνηκότας, ἐκατέρῳ τὸ οἰκεῖον ὁ νόμος ἀποδιδᾶς;*

And in the same Article from *Varro*, καθάπερ θεῶν ἱερὰ τιμῶντες τὰ τῶν πατέρων μνήμαζα.†

To which *Boxhornius* has confronted, as He says, a Passage from *Ovid*:

*Ante sepulchrales infelix adstitit aras,
Ex quo relliquias divinique ossa parentis
Condidimus terra, moestasque sacra vimus aras.*

⁴ VIII. Met.
480.

The first Verse indeed is *Ovid's* ⁴, but the two other are in *Virgil* ⁵.

⁵ V. Aen. 47.
48.

The Athenians also, under the wise Constitutions of *Solon*, enforced this Instance of Piety, viz. of Supporting the old Age of Parents, by very severe Appointments.

Οἷς τὸν τε γόνυ πατέρα τὸν αὐτὸν ἔτυπλε. ΚΑΙ ΟΥΔΕΝ ΠΑΡΕΙΧΕ ΤΩΝ ΕΠΙΤΗΔΕΙΩΝ——πῶς ἔ καὶ διὰ τῆτο, καὶ διὰ τὸν ΤΗΣ ΚΑΚΩΣΕΩΣ ΝΟΜΟΝ, ἄξιός ἐστι θανάτῳ ζημιωθῆναι⁶;||

Αν τις λέγη ἐν τῷ δήμῳ τὸν πατέρα τύπῃων, ἢ τὴν μητέρα, ἢ ΜΗ ΤΡΕΦΩΝ, ἢ μὴ παρέχων οἴκησιν, τῆτον ἕκ ἐκ λέγειν⁷.§

Isæus most expressly ⁸,

† Οὐ τοίνυν ἐκ τέττε μόνον, ἀλλὰ καὶ ἐκ τοῦ ΠΕΡΙ ΤΗΣ ΚΑΚΩΣΕΩΣ ΝΟΜΟΝ δῆλόν ἐστιν. Εἰ γὰρ ἔζη μὲν ὁ πάππος, ἐνδεὴς δὲ ἦν τῶν ἐπιτηδείων, ἕκ ἂν ἔτος ὑπόδικος ἦν τῆς ΚΑΚΩΣΕΩΣ, ἀλλ' ἡμεῖς. ΚΕΛΕΥΕΙ ΓΑΡ ΤΡΕΦΕΙΝ ΤΟΥΣ ΓΟΝΕΑΣ. Γονεῖς δ' εἰσὶ μήτηρ καὶ πατήρ, καὶ πάππος καὶ τήθη, καὶ τέτων μήτηρ καὶ πατήρ, εἰάν ἐτι ζῶσιν. Εκείνοι γὰρ ἀρχὴ τῆ γένεος εἰσὶ, καὶ τὰ ἐκείνων παραδίδόσιν τοῖς ἐγγόνους. Διόπερ ΑΝΑΓΚΗ ΤΡΕΦΕΙΝ αὐτὲς εἰσι, καὶ μὴδὲν καλᾶλίπωσι. Πῶς
ἐν

⁶ *Lyfias* c. A.
gorat. p. 268.
Ed. Lond.

⁷ *Aeschin.* c.
Timarch. Ed.
Cant. pag. 21.

⁸ *Orat. d. Ci-*
ceronis hered.
pag. 72. Edit.
H. S.

* Cur Parentes esse. ut filii velatis cœpitibus, filiae nudis, passisque crinibus? An, quia filiis venerandi sunt patres tanquam Dii, filiabus autem lugendi ut mortui, lex utrique parti suum decoro conveniens assignavit officium?

† Parentum sepulchra, tanquam Deorum templa, colentes.

‡ Qui natura patrem verberavit, neque ei vitæ necessaria suppeditavit——quo pacto non propter hæc, tum autem propter legem malæ tractationis, non est dignus qui morte mulsetur?

§ Qui verba fecerit apud populum, si patrem matremve verberaverit, aut non alat, aut domo excludat, infamis sit, neque ei orationis habendæ facultas permittatur.

† Atqui non solum ex hoc, sed ex lege malæ tractationis manifestum est. Si enim avus non viveret, et rebus necessariis indigeret, non iste reus legis de malâ tractatione esset, sed nos. Jubet enim parentes alere. Parentes vero sunt Mater et Pater, et Avus et Avia, eorumque parentes, si adhuc vivant (id est, Proavus et Proavia). Illi namque generis principium sunt, et bona eorum posteris per manus traduntur. Quapropter eos alere necesse

ἐν δίκαιόν ἐστι, εἰ μὲν μηδὲν καταλίπωσιν, ἡμᾶς ὑποδίκας εἶναι τῆς ΚΑΚΩΣΕΩΣ, ἢ ΜΗ ΤΡΕΦΩΜΕΝ· εἰ δὲ τι κατ' ἀλεοπάσει, τόνδ' εἶναι κληρονόμον, ἀλλὰ μὴ ἡμᾶς;

Οὐκ οἶσθα ὅτι καὶ ἡ πόλις ἄλλης μὲν ἀχαριστίας ἐδεμιάς ἐπιμελεῖται, ἐδὲ δικάζει, ἀλλὰ περιορᾷ τὴν εὖ πεπονθόταν χάριν ἐκ ἀποδιδόντας· εἰ δὲ τις γονέας μὴ θεραπεύῃ, τέττω δίκην τε ἐπιτίθησι, καὶ ἀποδοκιμάζουσα ἐκ ἑᾶ ἀρχεῖν τέτον, ὡς ἔτε ἂν τὰ ἱερὰ εὐσεβῶς θυόμενα ὑπὲρ τῆς πόλεως τέττω θυοῖτο, ἔτε ἄλλο καλῶς καὶ δίκαιως ἐδὲν ἂν τέττω πράτταντο; καὶ νῦν Δία εἰάν τις τῶν γονέων τελευτήσων τὴν τάφον μὴ κοσμήῃ, καὶ τέτο ἐξετάζει ἡ πόλις ἐν ταῖς τῶν ἀρχόντων δοκιμασίαις. Σὺ ἔν, ὦ παῖ, ἂν σωφρονῇς, τὴν μὲν Θεὸς παραιτήσῃ συγγνώμονας σοι εἶναι, εἴτι παρημέληκας τῆς μητρὸς, μή σε καὶ ἔτοι νομίσαντες ἀχαρίζον εἶναι, καὶ ἐβέλωσιν εὖ ποιεῖν. Τὴν δὲ ἀνθρώπος φυλάξῃ, μή σε αἰσθόμενοι τῶν γονέων ἀμελεῖν πάντες ἀτιμάσωσιν, εἴτα ἐν ἐρημίᾳ φίλων ἀναφανῇς. Εἰ γὰρ σε ὑπολάβοιεν πρὸς τὴν γονεὺς ἀχαρίζον εἶναι, ἐδεῖς ἂν νομίσειεν εὖ σε ποιήσας χάριν ἀπολήψεσθαι.*

* Xenoph.
Memorab. II.

† Philip. IV.
n. 57. Ed. Pa-
ris.

Demosthenes also :

Οὐδὲ γὰρ ἐν ταῖς ἰδίαις οἰκίαις ὁρῶ τὸν ἐν ἡλικίᾳ πρὸς τὴν πρεσβυτέρως ἔττω διακεῖμενον, ἐδ' ἔττω ἀγνώμονα, ἐδ' ἄτοπον τῶν ὄντων ἐδεῖν, ὡς, εἰ μὴ ποιήσῃν ἅπαντες, ὅς ἂν αὐτὸς, καὶ φάσκοντα ποιήσῃν ἐδὲν ἐδ' αὐτόν. Καὶ γὰρ ἂν τοῖς τῆς ΚΑΚΩΣΕΩΣ εἴη ΝΟΜΟΙΣ ἔτος τότε ἔνοχος. Δεῖ γὰρ, οἶμαι, τοῖς γονεῦσι τὸν ὀρισμένον ἐξ ἀμφοτέρων ἔρανον, καὶ παρὰ τῆς φύσεως καὶ παρὰ τῆ νόμου δίκαιως φέρειν, καὶ ἐκόνη ὑποτελεῖν †.

Though the Terms *Κάκωσις* and *Κακῶσαι* seem to be express and emphatical in denoting the Breach of this Duty, and the Neglect of the Honour which We owe our Parents, τὸν δὲ δῆμον, ὃν αὐτὸς φησι ΠΑΤΕΡΑ αὐτῶ εἶναι, φαίνεται ΚΑΚΩΣΑΣ ‡, yet is it the Name of other Actions

‡ Lysias pag.
267.

cessit esse, etiam si nihil reliquerint. Quod pacto igitur aequum est, etsi nihil reliquerint, nos legi de mala translatione obnoxios esse, si non aliam: sin autem quid reliquerint, hunc heredem esse, et non nos?

* An ignoras, quod Civitas quoque aliam quidem non nimium curat ingratitudinem, nec in iudicium compellit, sed despicit, si quis beneficiis acceptis non reddat gratias: si quis vero parentes non obsequetur, hunc in iudicium compellit, ac reprobatur, magistratibusque omnibus indignum existimat, tanquam ab illo non possint neque sacrificia pie sacrificari, nec aliud quicquam bene aut iuste agi! Nec solum hoc, sed etiam si quis parentum defunctorum sepulchra non ornet, hoc etiam Civitas explorat in electionibus magistratuum. Tu itaque, fili, si compos es mentis, et Deos ut tibi ignoscant exorabis, siquid matrem neglexisti, ne ingratum te esse existiment, nec benefacere velint: Ab hominibus quoque cavebis, ne sentientes quid contemnas parentes, pro nihilo te habeant, et privatus amicis omnibus effectus fueris. Si enim te arbitrabuntur erga parentes ingratum esse, nullus putabit te pro susceptis beneficiis fore in referenda gratia memorem.

† Neque enim in privatis familiis adolescentem erga seniores ita affectum esse video, neque adeo recordem, aut ineptum quendam omnium, ut, nisi omnes ea agant quae ipse agit, se quosque neget acturum esse quicquam. Is enim tum legibus malae translationis teneretur. Decere enim censetur constitutam ab utraque stipem, et a natura et a lege, iuste reddi et ultro pendi.

‡ Eum populum, quem suum patrem vocat, palam male tractat.

in

in the Athenian Jurisprudence, besides this. It is, for instance, the Name of that *Action* which is allowed a Wife against her Husband for Ill-usage : and it is also of that, which a Ward had against his Guardian.

¹ Harpocration, Suidas, etc.

This the Books shew, that are written upon this Subject ¹.

² ad Lib. IV. init.

Upon this Occasion, *viz.* the Mention of the *Δίκη Κακώσεως*, I shall introduce an Observation upon the Scholiast of *Apollonius Rhodius*, which may be worth regarding. What We have of old *Scholia*, is commonly a Patchwork out of several Authors, one generally finding Employment for another. And this is the Case before us. The first Commentator ², probably an Athenian by Birth, or one acquainted with that Country, writes thus, in the manner of that People : *Απορῆνός μὲ πώτερον ἐρωτικῶ πάθει, ἢ ΚΑΚΩΣΕΩΣ ΦΥΓΗΝ ποιημένη, κατέλιπε [Medea] τὴν πατρίδα.* Another, that comes after him, finds fresh Work cut out for him, and that He is now obliged to explain not only his Author, but those Interpreters that went before him. *ΚΑΚΩΣΕΩΣ ΦΥΓΗΝ ΠΟΙΟΥΜΕΝΗ* [says the second] *ἦγεν φοβηθεῖσα μήπως κακωθῇ ὑπὸ τῷ πατρί.* His Design doubtless was good, but then He comes lamely off in the Execution. *Κακώσεως δίκην φεύγειν*, and, from thence, *Κακώσεως φυγή*, is not applicable to any Severity that *Medea* might apprehend from her Father : but is expressive of that Disobedience in the Daughter, which is described by the emphatical and juridical Name *Κακώσεως*, and was that, *of running away with a young Sailor without her Father's Consent.*

³ T. 1. pag. 198. Ed. Bryan.

Before I take leave of the Severity of this Constitution, and the high Price which *Solon* set upon the Merits of the Father, let us consider what Abatements He has made in favour of the Son. And *Plutarch* in his Life ³ tells us, that there was a Law of his making, that this Charge did not lie upon the Son, if the Father had neglected his Education :

*Νόμον ἔγραψεν, ὡς τρέφειν τὸν πατέρα μὴ διδασκόμενον τέχνην, ἐπ' ἀνάγκης μὴ εἶναι **.

The same wise Appointment was recorded also by one of their Stage-Writers, whose Fragments leave us very sensible of the Loss of him :

Haec ita esse plures Philosophi dixerunt, non minus etiam Poetae, qui antiquas Comoedias Graece scripserunt, ut easdem sententias versibus in scena pronunciaverunt, Eucrates, Chionides, Aristophanes. maxime etiam cum his Alexis, qui Athenienses ait ideo oportere laudari, quod omnium Graecorum leges cogunt parentes ali a liberis, Atheniensium non omnes, nisi eos qui liberos artibus erudissent ⁴.

⁴ Vitruv. Praef. Lib. VI.

** Legem tulit, ut Filius non teneretur patrem alere, qui eum artem aliquam quaestumve non docuisset.*

And

And so *Galen* also⁵:

⁵ *Protreptic.*

Επαινέσῃ δ' ἂν τις καὶ τὸν Αθηνῆσι νομοθέτην, ὃς τὸν μὴ διδάξαντα τέχνην, ἐκώλυε πρὸς τῷ παιδὶ τρέφεσθαι, τέχνης ἀπάσης κατ' ἐκεῖνον μάλιστα τὸν χρόνον ἀσκημένης.*

Hitherto I have been considering this Relation, with a View to its natural Principles, the Purposes for which it was intended, and the Hold it has upon our Constitution. This led me to speak to what We may call the *Igniculi* of our Nature, by the force of which the Father feels for the Son, and the Son for the Father. My next Advance was to offer a Conjecture (whether satisfactory or not, must be left with my Reader) why those Sparks of Affection, which Children feel, are given to Our Natures, and denied to the rest. This engaged me in a Reflection or two upon the Duty which seems to be entailed upon us, of sustaining those that begat us, if they want our Assistance, and We are in a Condition of affording it. By this means I was compelled in some measure to anticipate a Part of my own Plan, which was to consider distinctly and minutely the *Parental* Duties, on the one hand, and the *Filial*, on the other: and which I now come to execute.

I.

The Duty of the Father, and the Right, in consequence of that, created to the Son, consists chiefly in two Points; *viz.* the Nurture of the Animal Part, and the Education of the Intelligent, with all the subordinate Considerations, which class under one or other of these Heads. *Plato* said very justly⁶.

⁶ in *Critone*, pag. 45. Ed. H. Steph.

Οὐ χρὴν ποιεῖσθαι παῖδας, ἢ ξυνδιαλαλαίπαρεῖν τρέφοντα καὶ παιδεύοντα.†

The natural Duty of Maintenance is exceedingly obvious, from the Impotence of that State and Condition, in which We want it, and from the abstracted Consideration of Paternity. Which presents us with an Idea of giving Life and Being, not of taking away, or destroying, it.

*Necare videtur, non tantum is qui partum praefocat, sed et is qui abjicit, et qui alimonii denegat, et is qui publicis locis misericordiae causa exponit, quam ipse non habet*⁷.

⁷ D. 25. 3. 4.

And of this Principle that whole *Title*, the next *Law* especially, is full, and worth consulting.

Under this Consideration many things are naturally included: the Bodily Health and Preservation of the Child, the Protection of his Person, his future Subsistence, and whatever can contribute to his Well-Being.

* *Jure aliquis laudet Atheniensem Legislatorem, qui prohibuit filium alere istum parentem qui cum nullam artem docuerat; arte omnigena eo tempore potissimum florente.*

† *Aut non erant suscipiendi liberi, aut in illis alendis et instituendis quantumvis molestus anxiusque labor constanter perferendus est.*

The

The Human Species is particularly and properly concerned in the other, viz. Education². That also may be considered as to the *Morals* of the Son, and as to the *Understanding*; in both which the Father is greatly interested. By the *Understanding* I would not be thought to intend a literary Education, to which the Writers upon this Subject maintain the Father is not strictly bound. But by that general Word I would insinuate, that He is obliged to qualify him, either by himself or others, according to his Condition, for what Profession He is able to support, and the Son is most capable of exercising: And indeed in that Light a Literary Education may be comprehended, as it may stand for a Profession.

Man being thus circumstanced, that his *Education* is to be attended to, as well as his *Nature*, no wonder if the Parental Affection does not determine at an earlier Period than We commonly find it; or sink into Indifference and Forgetfulness, as We observe it to do in the Animal System. Let this therefore pass for a Conjecture of the Reason of that Measure which Providence intended by the Continuance of the Parental Affection in the Human, and the Decay of it, in the Brutal Species. And a very sensible Writer of Antiquity comes up, in great measure, to this Hypothesis:

Η γὰρ Φύσις, ὥσπερ ἐν φυτοῖς ἀγρίοις, οἷον οἰνάνθαις, ἐρινεοῖς, κοτίνοις, ἀρχαῖς ἀπέπληκς καὶ ἀτελεῖς ἡμέρων καρπῶν εἶναι φύει, ἕτω τοῖς μὲν ἀλόγοις τὸ πρὸς τὰ ἐγλῶνα φιλόσοργον, ἀτελὲς καὶ ἡ διαρκὲς πρὸς δικαιοσύνην, ἡ δὲ τῆς χρείας προσωτέρω προερχόμενον ἔδωκεν. ἄνθρωπον δὲ λογικὸν καὶ πολιτικὸν ζῶον ἐπὶ δίκην καὶ νόμον εἰσάγεσθαι, καὶ θεῶν τιμὰς, καὶ πόλεων ἰδρύσεις, καὶ φιλοφροσύνην, γενναῖα καὶ καλὰ καὶ φερέκαρπα τέτων σπέρματα παρέσχε, τὴν πρὸς τὰ ἐγλῶνα χάριν καὶ ἀγάπην, ἀκολοθεῖσαις πρώταις ἀρχαῖς. Αὗται δὲ ἦσαν ἐν ταῖς τῶν σωμάτων κατασκευαῖς.*

²Plutarch. De amore Proles.

Besides these Considerations which the Son is intitled to, there are some of a less Concern, such as the Right of bearing the Name, the Arms, &c. of the Father. Of the same nature was the Title, which He had to the *Sacra Gentilitia*, which with the Romans were of no mean Consideration. Of this something has been observed before¹, and more may be seen in *D'Arnaud*² and *Heineccius*³. But in the Roman Law particularly, there is one not to be passed over, which was the Right of Succession, and what that Dispensation of Law held very high, and very sacred.

The *Heres Domesticus*, the *Suus Heres* (i. e. The Son under the Father's Power, or the Grandson upon the Death or Emancipation of that Son, and

¹ Above, pag.

² Lect. J. Civ.

³ Antiqq. Rom. T. I. pag. 338.

* Natura enim, sicut in plantis silvestribus, ut labruscis, caprificis, oleastris principia fructuum mitium cruda et imperfecta gignit: ita brutis quoque amorem foetus in sevit imperfectum, et non pertinentem ad justitiam, neque ultra utilitatem sese proferentem: homini vero, quem protulit ut animal esset ratione praeditum, ac civile, justitiamque, leges, et Deum coleret, urbesque concelebraret, et amice cum aliis viveret, semina quoque harum rerum praeclara pulchra et foecunda inseruit, amorem sc. proles, secuta in hoc prima principia, quae in ipsa corporis insunt constructione.

so on) by a Fiction of Law, which We shall have occasion to mention again, is supposed to be one Person with the *Paterfam.* and not to *succeed* into the Estate, but to have been in before.

*Sed Sui quidem Heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque patre quodammodo Domini existimantur*⁴.

⁴ J. 2. 19. 2.

So Terence⁵:

⁵ Heauton. I.

*Nec fas esse, ulla me voluptate hic frui,
Nisi ubi ille huc salvus redierit meus particeps.*

1. 97.

And Cicero⁶,

⁶ Lib. I. in
Verrem, 44.

Quibuscum vivi bona nostra partimur.

*Cum Ratio naturalis, quasi Lex quaedam tacita, liberis parentium hereditatem addiceret, velut ad debitam successionem eos vocando, propter quod et in Jure Civili Suorum Heredum nomen eis inductum est, ac ne judicio Parentis, nisi meritis de causis, summoveri ab ea successione possunt*⁷——

⁷ D. 48. 20. 7.

*In Suis Heredibus Aditio non est necessaria: quia statim ipso jure heredes existunt*⁸.

Pr.

⁸ D. 38. 16. 14.

*In Suis Heredibus evidentius apparet, continuationem dominii eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi Domini essent qui etiam vivo patre quodammodo Domini existimantur; unde etiam Filiusfam. appellatur, sicut Paterfamilias: sola nota hac adjecta, per quam distinguitur Genitor ab eo qui genitus sit. Itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur. Hac ex causa, licet non sint heredes instituti, Domini sunt. Nec obstat, quod licet eos exheredare, quod et occidere licebat*⁹.

⁹ D. 28. 2. 11.

*Liberorum appellatione Nepotes et Pronepotes, ceterique qui ex his descendunt continentur. Hos enim omnes Suorum appellatione Lex XII. Tabularum comprehendit*¹.

¹ D. 50. 16.

Nec vultum agnoscit amici,

220.
Add Alexand.
Polit. de patria in Testam.
cond. potest. I.
2. apud Meer-
man. Thef.
Jur. Tom. I.

*Cum quo praeterita coenavit nocte, nec illos,
Quos genuit, quos eduxit; nam Codice saevo
Heredes vetat esse Suos*².

² Juvenal. X.
234.

*Heres apud antiquos pro Domino ponebatur*³.

And this serves to explain a Law of Tryphoninus⁴:

Si [Pater] ut Heres, vivo filio, vindictam servo [Castrensi] imposuit.

³ Festus.

Where Heres must be Proprietor or Lord, not Heir; because, as Cujacius⁵ justly observes, the Father was not the presumptive Heir to the *Peculium Castrense* of his Son.

⁴ D. 49. 17. 19.

⁵ X. Observ.
16.

⁶ Bacchid. IV.
8. 8.

So *Plautus* ⁶:

Exheredem fecero vitae suae.

⁷ Menaechm.
III. 2. 11.

And again ⁷,

*Prandi, potavi, scortum accubui, abstuli
Hanc, cujus heres nunquam erit post hunc diem.*

This Heir by the Greek Writers is called *Αὐτοκληρονόμος*, and St. Paul ⁸ Gal. IV. 7. is thought to allude here, when He writes ⁸, *Ὡς ἐκ ἐτὶ εἰ δὲ ἄλλος ἄλλ' υἱός· εἰ δὲ υἱός, καὶ κληρονόμος*. *If a Son, then Heir.*

The English Law is also very favourable to this Apprehension. Thus if a Man leaves by his last Will and Testament to his Son, what would have come to him by Inheritance, supposing that Testamentary Disposition had not been made, the Rights, by which this Son succeeds and acts, and all the Consequences of that Succession, are the Rights and Consequences of one claiming by Descent, and not as Testamentary Heir: Because it is fitting, that a greater Consideration should be paid to the Disposition of Nature, than the Creation of Law.

No wonder therefore, that all Law should be so tender of the Rights of Blood, and so jealous of Disinheritances:

⁹ J. 2. 13. pr.

Qui filium in potestate habet, curare debet, ut eum heredem instituat, vel exheredem eum nominatim faciat: alioqui si eum silentio praeterierit, inutiliter testabitur ⁹.

¹ D. 28. 2. 30.

Inter cetera, quae ad ordinanda testamenta necessario desiderantur, principale ius est de liberis heredibus instituendis vel exheredandis: ne praeteritis istis rumpatur Testamentum. Namque filio, qui in potestate est, praeterito, inutile est testamentum ¹.

² Cic. I. de
Orat. 38.

Quae potuit igitur causa esse major, quam illius militis, de cuius morte, cum domum falsus ab exercitu nuncius venisset, et pater ejus, re credita, testamentum mutasset, et quem ei visum esset, fecisset heredem, essetque ipse mortuus, res delata est ad Cuiros, cum miles domum revenisset, egissetque lege in hereditatem paternam testamento exheres filius? Nempe in ea causa quaesitum est de Jure Civili, possetne paternorum honorum exheres esse filius, quam pater testamento neque heredem, neque exheredem scripsisset nominatim ²?

And to this Principle is owing, without Doubt, the Custom, which obtains at this Day with some People, of *leaving their Son a Shilling*, and not *passing them over in Silence*.

II.

AND NOW a Word or two for the Counterpart, the other Side of the Ballance, the Obedience and Reverence of Children.

Mé-

Μέμνησο, ὅτι υἱὸς εἶ τις. Τέτε τῷ προσώπῳ ἐπαγγελία, πάντα αὐτῷ
ἡγεῖσθαι τῷ πατρὶ, πάντα ὑπακύν, μηδέποτε ψέξαι πρὸς τινα, μηδὲ
βλαβερὸν τι αὐτῷ εἰπεῖν ἢ πρᾶξαι, ἐξίσασθαι ἐν πᾶσι, καὶ παραχωρεῖν,
συνεργεῖν κατὰ δύναμιν.*

³ Arrian. ad
Epiet. II. 10.

I shall be excused for dwelling but little here: as this Duty lies level even to the most ordinary Apprehensions. And indeed one great Article of it has been considered already. Briefly therefore every thing is to be conceived as understood in this Obligation, which can follow the Right of that Power or Dominion, which the Father is by Nature and Law possessed of; whatever can be supposed to flow from the Apprehension of his superior Judgment and Understanding; from the Merit of producing us into Being, and supporting the Process of Education; the *Donum Vitae* and *Beneficium Educationis*, according to *Valerius Maximus*⁴. So that the Amount or gross Sum of our Duty may fairly challenge the Appellation of *Piety*, which We have seen was steadily and uniformly given it.

*Pater et Mater nomina sunt Pietatis, Officiorum vocabula, vincula Naturae, secundaque post Deum foederatio. Non est Laus, si vos diligitis: Scelus, si odistis*⁵.

⁵ Hieron. Epist. de vitando suspect. Contubern.

However there is a Difficulty upon this Head, which must be adjusted: sc. *Whether greater Honour is due to our Parents, or our Country?*

*Vt Parentibus, et Patriae pareamus*⁶.

⁶ D. 1. 1. 2.

*Parentibus, et Diis immortalibus, et Patriae nos primum Natura conciliat*⁷.

⁷ Cic. de Harusp. Resp. 27.

One would think, that by the Position of the Words, our Parents have a prior Right to our Duty, than our Country. But the contrary is maintained in its fullest Force; viz.

If our Parents direct one thing, and the Laws (or Interest) of our Country demand the contrary, the Ballance is in favour of our Country.

For 1. Public Emoluments have the Preference to Private ones. There seems to be in the State a *Dominium Eminens*, or Paramount, to which all inferior Authority must give place.

*Nam quod ad Jus publicum adinet, non sequitur Jus Potestatis*⁸.

⁸ D. 36. 1. 14.

2. Private and Inferior Rights relate only to the Good or Interest of Individuals: Eminent and Superior Rights deal in the common Benefits of Many, and therefore excell the former.

3. The Father, before the Institution of Civil Societies, might have a Shadow of Government, a kind of Patriarchal Royalty. But upon the

* *Memento Te esse Filium. Istius personae Professio est, ut omnia sua patris esse existimet, omnibus in rebus dicto ei audiens sit, nunquam eum apud quenquam vituperet, neque vel dicat, vel faciat quidquam, quod ei incommode, cedat etiam illi in omnibus et locum det, adjuvans pro virili.*

Transfer of Sovereignty from Domestic to Civil, much of the Right He had, seems to rest in the Civil Magistrate. That is : The Domestic Authority is less plenary now, than it was then. The Father has still left him a Title to the private Regards of Piety, Reverence, and Affection : But that Species of Civil Authority, which they might have had over their Families *Respectively*, is now conveyed into the Hands of One or More, for the Good of the whole *Universally*.

4. The State, in its Injunctions, takes no notice of the *Patria Potestas*, allows no Consideration for that Dependence, which the Son owes the Father in his private and domestic Capacity. It looks upon the Father and Son in the same light, lays its Obligations upon each, as if they were in *pari statu*, and never examines, which is *Pater-* or which is *Filius-Familias*.

*Filiusfam. ex omnibus causis, tanquam Paterfam. obligatur, et ob id agi cum eo tanquam cum Paterfam. potest*⁹.

⁹D. 44. 7. 39.

The Power of the Father seems in some measure to be suspended : And to use the Words of *Valerius Maximus*¹:

¹ II. 2. 4.

Nec ignoro, quid patriae venerationi debeatur : verum publica instituta privata pietate potiora judico.

5. Though in several Prosecutions the Law looks upon Father and Son (as also upon Husband and Wife) as *una Persona* : Yet in Cases of Treason (where the public Interest comes to be concerned) this Fiction of Law prevails no longer².

² Nov. 115. 3.
3.

6. It must be admitted, that the Father himself is bound by the Laws of his Country. Therefore He cannot by any Authority whatsoever do by another, *viz.* his Son, what He could not do by himself.

And to this Doctrine all good Writers bear their Testimony.

*In ipsa autem Communitate sunt gradus Officiorum, ex quibus quid cuique praestet, intelligi possit : ut prima Diis immortalibus, secunda Patriae, tertia Parentibus, deinceps gradatim reliqua reliquis debeantur*³.

³ Cic. I. Offic.
fin.

*Iustitiam cole et Pietatem, quae cum magna sit in Parentibus et Propinquis, tum in Patriam maxima esse debet*⁴.

⁴ Id. Somn.
Scip.

*Commoda praeterea Patriae sibi prima putare, Deinde Parentuum, tertia jam postremaque nostra*⁵.

⁵ Lucil. I. Sat.
1.

*Prior mihi ac potior ejus Officii Ratio est, quod Patriae, quam quod uni Homini debeo*⁶.

⁶ Senec. VIII.
de Benefic. 19.

*Minime majores lugendum putaverunt eum, qui ad patriam delendam, et parentes et liberos interficiendos venerit ; quem, si filius patrem, aut pater filium occidisset sine scelere, etiam praemio adficiendum omnes constituerunt*⁷.

⁷D. 11. 7. 35.

2

Calli-

Callistratus has recorded this Rescript of *Severus**,

* D. 50. 4. 14.

Si in numero plebeiorum filius tuus est, quanquam invitus honores ex persona filii suscipere cogi non debeas; tamen resistere, quo minus patriae obsequatur periculo ejus qui nominavit, jure Patriae Potestatis non potes.

It was the Saying of *Plato*, that Children are born to the Republic, and for the Republic, rather than their Fathers. Something like this in *Vlpian*°. °D. 37. 9. 1. 15.

Partus enim iste alendus est, quia non tantum Parenti, cujus esse dicitur, verum etiam Reipublicae nascitur.

Cicero puts the Case exactly¹.

¹ III. Offic. 23.

Quid si Tyrannidem occupare, si patriam prodere conabitur Pater? Silebitne Filius? Immo vero obsecrabit Patrem, ne id faciat. Si nihil proficiet, accusabit, minabitur etiam. Ad extremum, si ad perniciem patriae res spectabit, patriae salutem anteponet saluti patris.

And much such a Case there is in a Chapter of *A. Gellius*², which contains a Dispute upon this very Question: II. 7.

Quaeri solitum est — An semper, inque omnibus jussis Patri parendum sit? Neque autem ille Sententia, quam primo in loco dixi, vera et proba videri potest, omnia esse, quae Pater jusserit, parendum. Quid enim? Si prodicionem patriae, si Matris necem, si alia quaedam imperarit, turpia aut impia? Media igitur Sententia optima atque tutissima visa est: quaedam esse parendum, quaedam non obsequendum. Sed ea tamen, quae obsequi non oportet, leniter et verecunde, ac sine detestatione nimia, sineque approbatione acerba reprehensionis declinanda sensim et relinquenda esse dicunt.

There is a large Fragment in *Stobaeus*³ of *Musonius*, containing a Disquisition upon this Subject, LXXVII.

³ Serm. LXXVII.

Αγα γε χρὴ πάντα πείθεσθαι τοῖς γονεῦσιν, ἢ ἐξω αὐτῶν καὶ παρακινεῖν αὐτῶν;* and very proper to accompany the Quotation from *Gellius*. It is too long to find a Place here, but my Reader will not neglect it.

The ancient Greek and Roman History is full of these Instances of Heroism, which are alluded to by *Tully* and *Gellius*. But let it be remembered, that nothing less than the certain and unavoidable Danger of the Public can justify them, or have a Right to extinguish our Domestic Feelings and Tenderesses. As the Emperor very well expresses it:

*Licet Legum contemptor et impius sit, tamen Pater est*⁴.

⁴ Nov. 12. 2.

III.

The POWER OF THE FATHER (for of this I engaged myself to speak in the third Place) deserves a particular Consideration by itself.

* An per omnia obsequendum parentibus, aut in aliquibus rebus id non faciendum est?

With

With many of the Ancients This was raised to a great Degree of Sovereignty: with the Romans particularly, some of whose Writers give it not unfitly the Name of MAJESTAS PATRIA.

⁵ Liv. VIII. 7.

*Quandoque Tu, T. Manli, neque imperium Consulare, neque Majestatem Patriam veritus*⁵.

⁶ Valer. Max. VII. 7. 5.

*Movit profecto Pisonem Patria Majestas, donum Vitae, beneficium Educationis*⁶.

For that People in the Word *Paterfam.* included the Idea of Government or Dominion:

⁷ D. 50. 16. 195. 2.

*Non qui filium habet, sed qui dominium. Non enim solum ejus Personam, sed et Jus demonstramus*⁷.

⁸ Tertullian. Apologet. pag. 31. Edit. Rigalt.

*Sed et gratius nomen est Pietatis quam Potestatis. Etiam Familiae magis Patres, quam Domini vocantur*⁸.

This was frequent with the Poets of Antiquity. So when Homer applies to *Jupiter*, as he does frequently, the Words

Πατὴρ ἀνδρῶν τε θεῶν τε,

He thereby understands his Empire and Command.

⁹ IX. Aen. 448.

And so *Virgil* after him⁹,

*Dum Domus Aeneae Capitoli immobile saxum
Accolet, imperiumque Pater Romanus habebit.*

So that I can suppose a *Pater*, who is not a *Paterfamilias*: as the Son who is married, and has Children in his Father's Life-time. (As indeed I can v. v. a *Paterfam.* who is not a Father. For a Minor in Wardship was always considered as a *Paterfamilias*. There was no Medium in the case. Every Roman Citizen, who was not *Filiusfam.* was *Paterfam.* of Necessity¹.)

¹ D. 1. 6. 4.

Again, I can have the Idea of a Son [*Filius*] who is not *Filiusfamilias*, viz. a Son that is emancipated, and becomes by that Act *sui Juris* and Independent. (But here I cannot, *vicissim*, have the Idea of a *Filiusfam.* without the Idea of a Son. Because *Filius* is not capable of two Senses, as *Pater* is.)

The Writers of Law, upon occasion, can soften their Expressions, and consider this Power or Paternal Empire in a much milder Light:

² D. 48. 9. 5.

*Divus Hadrianus fertur, cum in venatione filium suum quidam necaverat, quod novercam adulterabat, in insulam eum deportasse: quod Latronis magis quam Patris jure eum interfecit. Nam Patria Potestas in pietate debet, non atrocitate consistere*².

³ D. 48. 5. 22.

The *Lex Julia de Adulteriis* permitted the Father to punish his adulterous Daughter with Death; but permitted nobody else: And the reason given for this Difference by *Papinian*³, is fair and natural.

⁴

Ideo autem Patri, non Marito, mulierem — permixtum est occidere, quod plerumque Pietas paterni nominis consilium pro liberis capit.
The

The Power of the *Father*, was of a different Complexion from all other Ideas of *Power* whatsoever, as *Master*, for instance, etc. Although there seems indeed to have been but little Difference in the Condition of the *Son* and the *Slave*; nay, in some Considerations, the Circumstances of the latter may seem the more eligible of the two.

This Passage of *Lactantius*⁴ has been often brought to justify the Resemblance: ⁴ IV. Div. Instit. 3.

Dominum eundem esse, qui sit Pater, etiam Juris Civilis ratio demonstrat. Quis enim poterit filios educare, nisi habeat in eos Domini potestatem? Nec immerito Paterfam. dicitur, licet tantum filios habeat. Videlicet nomen Patris complectitur etiam servos, quia Familias sequitur: et nomen Familiae complectitur etiam filios, quia Pater antecedit. Vnde apparet eundem ipsum et Patrem esse Servorum et Dominum Filiorum. Denique et Filius manumittitur, tanquam Servus, et Servus liberatus Patroni nomen accipit, tanquam filius. etc.

And as their Condition was nearly uniform during Life, so sometimes in their Death, and in the Honours of Sepulture, they were not divided.

D.

NICONI FILIO
DVLCISSIMO
QVI V. MENS. XI.
DIEBUS VIII.

M.

EVTYCHETI
VERNAE
QVI VIX. AN. I.
MENS. V. DIEB. X.

PVBLICIA GLYPTE FECIT⁵.

⁵ Fabrett.
pag. 6.

However the Administration of *Father* and *Master* are widely different⁶, and have occasionally been very well distinguished. The Former ⁶ Murett. Var. Lect. VII. 4. has been not unhappily compared to that Command or Empire, which Reason ought to hold over the Affections; where there is not so much a Display of Rigor and Authority, as a Warmth and Friendship of Advice; a prudent and calm Direction for the good of the general System; and the Happiness of the Party in Subjection rather consulted, than the Arbitrary Satisfaction of the Party in Power.

Ξεῖν' ἤτοι μὲν ταῦτα φίλα φρονέων ἀγορεύεις,
Ὡς πατὴρ ὧ παίδι⁷ — *

⁷ Homer. Odyss. A. 308.

Whereas on the other hand, the *Dominica Potestas* does not differ in Degree, but in Sort. As *Sallust* very well expresses the Empire of the Will over the Organs of the Body⁸, *Animi Imperio, Corporis Servitio, magis utimur*, just such is the State of Lord and Servant. The Duty of the latter ⁸ Praef. B. Caillin.

* *Hospes, profecto haec amice sentiens dicis,
Perinde atque pater suo filio —*

is not insinuated by Blandishments and Allurements, but demanded by Force and Compulsion, by the Arguments of Fear, and the Apprehensions of Inconveniency. The Duty moreover is imposed not so much for the common Interest of both, as for the private Ease, Indulgence, Satisfaction or Emolument of the Party imposing. And last of all, the Servant is *in the Hand of his Master*, as an Instrument in the Hand of an Artist. His Function is what We may call Mechanical. So that when a Master makes up his own Disabilities, his Wants and Imperfections by the Assistance of Others, and by calling in, as I may term it, the Artifice of Servitude, that fine Iambic, which has been so successfully applied to the Mechanical Powers, may find a Place here also :

Τέχνη κρατῶμεν, ὣν Φύσει νικώμεθα.*

Upon the whole, the *Potestas Herilis* cannot perhaps be more finely imagined, than in that Representation We have given it. It was struck off by a great Master :

Ἡ μὲν γὰρ Ψυχὴ τῷ Σώματι ἀρχει ΔΕΣΠΟΤΙΚΗΝ ἀρχήν· ὁ δὲ Νῦν τῆς Ορέξεως πολιτικὴν καὶ βασιλικὴν †.

Τὸ χρώμενον τῷ Σώματι ἐστὶν ἡ Ψυχὴ. τὸ δὲ Σῶμα ὄργανον τῶν ἐπέχει πρὸς αὐτήν †.

* Aristot. I. Polit. 3.

† Hierocl. in Pythagor. pag. 152. Edit. Ahton. 1742.

And this Similitude of Subjection may possibly stand for a Reason, why with the Ancients, the Writers of Law as well as Others, Slaves are sometimes denoted by the Term *CORPORA*.

* D. 21. 2. 21.

So *Vlpian* †,

Cum igitur neque Corpus neque Pecunia Emptori absit —

Ἡ Συνήθεια τῆς δούλης ΣΩΜΑΤΑ εἶωθε καλεῖν — διὰ τὴν τῆς δούλης εὐλόγως ΣΩΜΑΤΑ ἐκάλεσεν, ἵνα δείξῃ τὴν χρῆσιν τῶν σωμάτων †.

ΣΩΜΑΤΑ πολλὰ τρέφειν, καὶ δούματα πολλὰ ἀνεγείρειν
Ἀβραππος εἰς πενίην ἐστὶν ἐτοιμοτάτη †.

* Epiphanius in Ancorato.

† Antholog. I. 12.

See Magius I. Miscell. 12.

Gataker. de Stylo N. T.

cap. X. et ad M. Antonin.

I. 16.

Forner. II.

Rer. Quotid. 26.

Casaubon. ad Athen. V. 10.

Commentar. de Inope Debitore, etc.

pag. 14.

* Ter. Adelph.

I. 1. 51.

The Power therefore of the Master over his Slave is a Dominion properly so called, and an arbitrary one : The Power of the Father over the Son, though in some Constitutions worked up very high, is founded in Love, and the Warmth of Natural Friendship. *Hoc Pater ac Dominus interest*, according to the Comedian †.

* *Superamus Arte, quæis Natura vincimur.*

† *Anima in Corpore exercet tale imperium, quale Herus in Servo. Ratio vero in Appetitu quale Imperium Politicum est vel Regium.*

§ *Animus est id quod Corpore utitur : Corpus vero erga eum instrumenti vice fungitur.*

¶ *Vsu venit ut Servos Corpora nominemus. — Ideo autem Servos decenter vocavit Corpora, ut ostendat usum corporum.*

‡ *Servos multos pascere, et domos multas exstruere
Via est ad paupertatem paratissima.*

So Herodotus¹,¹ Thalia, 89.

Λέγασσι Πέρσαι ὡς Δαρεῖος μὲν ἦν Κάπηλος Καμβύσης δὲ Δεσπότης, Κῦρος, δὲ Πατήρ. ὁ μὲν, ὅτι ἐκαπῆλευε πάντα τὰ πρῆγμαλα, ὁ δὲ, ὅτι χαλεπός τε ἦν καὶ ὀλίγωρος, ὁ δὲ, ὅτι ἡπιός τε, καὶ ἀγαθὰ σφι τὰ ἐμνηχανήσατο.*

To proceed: The Power of the Father has its Foundation in two Principles,

1. *Jure Sanguinis,*
2. *Jure Familiæ.*

He has *one* Title to be the Sovereign of his Son, as that Son is draughted off from him, is a Piece or Part of Him: And He has *another* from the Genius of that Family Empire, where, according to *Homer*⁶,

⁶ Odyss. IX,
114.

Θεμισεύει δὲ ἕκαστος
Παῖδων, ἡδ' ἀλόχων.†

(1). Of these two Principles, which the best and most considerate Writers upon this Subject seem to agree in admitting as the Basis of the *Patria Potestas*, the former had a great Regard paid to it by the Ancients:

Τὸ γὰρ ἐξ αὐτῶ, οἰκεῖον τῷ ἀφ' ὧ, οἷον ὁδὸς, ἢ θρίξ, ἢ ὅ, τι ἂν τῷ ἔχοντι.

—— Γονεῖς μὲν ἔν τέκνα φιλεῖσιν, ὡς ἑαυτές. Τὰ γὰρ ἐξ αὐτῶν οἷον ἕτεροι αὐτοὶ τῷ κεχωρίσθαι⁷.‡

⁷ Aristot. VIII.
Ethic. 14.

Τὸ δὲ κτῆμα, καὶ τὸ τέκνον, ἕως ἂν ᾖ πηλίκον, καὶ μὴ χωρισθῇ, ὥσπερ μέρος αὐτῶ⁸.§

⁸ Id. V. 10.

This was a Doctrine which fell in with the Roman Lawyers; of whom the most distinguished were ever of the Stoic School⁹, and their Law in consequence had a Relish of that Philosophy. For let us but compare these Words of *Plutarch*¹,

⁹ Above, pag.
66. seqq.

Οἱ Στωικοὶ μέρος εἶναι αὐτὸ [τὸ ἔμβρυον] τῆς γαστρὸς, καὶ ζῶον. ὥσπερ γὰρ τὰς καρπὲς μέρη τῶν φυτῶν ὄντας πεπαινομένους ἀπορρεῖν, ἔτω καὶ τὸ ἔμβρυον, ||

¹ De placit.
Philosoph. V.
15.

with those of *Vlpian*²,

² D. 25. 4. 1. 1.

Partus, antequam edatur, mulieris portio est, vel viscerum.

* Persæ aiunt, Darium fuisse Infitorem, Cambysem autem Dominum, Cyrum vero Patrem: quoniam Darius res omnes quæstui habebat, Cambyss asper erat ac negligens, Cyrus mitis, et omnia bona illis quæ erat aggressus.

† Imperat autem unusquisque [P. fam.]
Liberis et Vxoribus.

‡ Quod ab aliquo profectum est, ejus est proprium, a quo profectum est, ut dens, aut pilus, aut quidlibet ejus, cui inhaeret. — Parentes liberos, ut se ipsos, diligunt: nam qui ex iis nati sunt, eo ipso quod separati sunt, tanquam alteri ipsi sunt.

§ Atqui Possessio, seu Mancipium, et Liberi, usque eo dum parvi sint, neque a patre sejuncti, patris instar sunt.

|| Stoici asserunt Embryon esse partem ventris, non animal. Quemadmodum enim fructus qui partes sunt plantarum, cum maturuere, defluunt, ita quoque se res habet quoad Embryon.

D d d

From

From this Similarity therefore, as if the Romance of the *Parley-Bed* had some Foundation in Nature, arose the *Right* of the Father, like the *Property* of the Owner or the Planter. The Allusion from the Plough has been in some measure spoken to above⁴, to which much more might be added. For it is common in all Writers whatsoever :

⁴ pag. 278.

³ Artemidor. I.
Oneirocritic.
53.

Γεωργεῖν, ἢ σπείρειν, ἢ ἀροτρεῖν, ἢ φυτεύειν, ἀγαθὸν τοῖς γῆμαι προσηγμέν-
νοῖς, καὶ τοῖς ἀπαισιν. Ἀρερὰ γὰρ ἔδεν ἄλλο ἐστὶν ἢ γυνή, σπέρμαξ δὲ
καὶ φυτὰ οἱ παῖδες, πυροὶ μὲν υἱοὶ, κριθαὶ δὲ θυγατέρες⁵. *

It is from this Consideration, that the Father and Son in the Eye of the Civil Law are looked upon as one Person: that the Family of the Father never dies while the Son exists: and that the Son does not *adire hereditatem*, but by a Fiction of Law was in Possession before his Father's Death⁶.

⁶ Above, pag.
385.

⁷ C. 6. 26. ult.
fin.

Cum et natura pater et filius eadem esse persona pene intelligantur⁷.

⁸ D 50. 16.
195. 2.

(2.) In regard to the other Title, that of *Family Government*, take the Words of *Vlpian*⁸:

Jure proprio Familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut jure subjectae. — Pater autem familias appellatur, qui in domo dominium habet.

⁹ I. Polit. init.

Oeconomy (I use the Word in its ancient and primitive Signification) as it was the Rudiments of Political Government, and might possibly lead the way to Civil Establishments: so even after those larger Establishments were made, had many of its private Interests and Rights preserved to it. *i. e.* The Father's Jurisdiction was lessened in a greater or less Degree in every Civil Constitution, as it suited the Fancy and Pleasure of the respective Founders, or the Cast and Complexion of each particular Foundation. But let it be, after the Introduction of Civil Establishments, of what Extent or Authority soever, it is enough for my present Purpose, to conceive it in any given Proportion. It is impossible to imagine any Society whatever (of this kind of Union) subsisting without some Principles of Administration; something to be directed, and something to be executed. Domestic Government therefore, being a System, made up of one principal striking Character, and *all* the rest, as Wife, Sons, and Servants in a State of Dependency, naturally formed the Monarchical Species, and was the reason, according to *Aristotle*⁹, why all the oldest Forms of Government in the World were of that Completion. For these were more immediately copied from the Family Plan, while the other Species, as Republics, *etc.* were the Creatures of Time, and the Issues of Art and Refinement.

* *Agriculturam [per somnum] exercere, aut seminare, aut arare, aut plantare bonum est uxorem quaerentibus, et non habentibus liberos. Arvum enim nihil aliud est quam mulier, femina autem et plantae liberi, triticum quidem filii, hordeum vero filiae.*

It is plain from what We have been now observing, that the *Power of the Mother* is a Monster in Law and in Reason. Indeed under the first Consideration, that of Blood and natural Connection, the Mother seems to have a Rival Interest with the Father, and upon that Principle, the *Reverence* due to each Parent is always undistinguishable.

*Pietas Parentibus, etsi inaequalis est eorum Potestas, aequa debetur*¹. ¹ D. 27. 10. 4.

But as to Power or Jurisdiction, it is easy to observe with *Seneca*²:

² III. Controvers.

Nemo potest alium in sua manu habere, qui ipse in aliena est.

And accordingly the *Filiusfam.* upon his Father's Demise immediately sets up for himself, and no Remainder of Power is lodged in the Mother, if She happens to survive her Husband.

Let us now consider in what Instances this Power is exerted. But as that is differently circumstanced in different Constitutions, (for every Father is possessed of just so much Power, as the Civil Magistrate leaves him) I am led to consider the Circumstances of the *Roman Father* more especially, both from the Nature of my Subject, which is Roman Law, and from this Consideration also; that his Empire suffered perhaps as little in that Constitution as in any; which in other Words, is what the Emperor writes³ after *Gaius*⁴,

Jus autem Potestatis, quod in liberos habemus, proprium est Civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem Nos habemus.

³ J. 1. 9. 2.

⁴ D. 1. 6. 3.

⁵ VIII. Ethic.

⁶ VII. Polit. 16.

⁷ II. V. H. 7.

This perhaps is not *strictly* true. For many Nations of Antiquity seem to have had it in almost as full force as the Romans. The *Persians*, the *AEgyptians*, the *Jews*, the *Greeks* (many of them at least), and the *Gauls* had a very absolute Dominion over their own Issue, such as exposing, selling, or lastly, putting to Death, as *Gothofred* upon the Law of *Gaius*, just cited, has observed. To whom may be added *Aristotle*⁵, *AElian*⁶, *Sext. Empiricus*⁷, *Noodt*⁸, *Petit*⁹, *Meursius*¹, *Oisellius*², etc.

⁷ Pyrrh. Hypotyp. III.

⁸ Jul. Paul. C. 1.

⁹ LL. Attic. pag. 236. Ed. Nov.

¹ in Solone, cap. 22.

² add Caii Instit. l. 2. 2.

³ Dionys. Halic. Sext. Empiric. Seneca Arrian, collected by Heinecc. Antiqu. II. 9. 1.

⁴ Above, pag. 64.

P. Nannii X. Miscell. 5.

1. One great Instance of the Subjection of the Son was his Incapacity to enjoy any Property. For with the Slave, He was, in great measure, the Property of another. Whatever therefore He acquired, He acquired for his Father³, not for himself, just as the Slave did with the Ancients, and the Apprentice of the Moderns does now in the Course of his own Trade and Occupation; and He was so far from being able to make a Will, that the Permission of his Father could not convey to him that Privilege⁴.

POWER OF THE FATHER.

Toremedy therefore, what would sometimes prove an Inconvenience, the Art of the Roman Lawyers invented, and the Connivance of the Roman Law indulged, the Fiction of *PECULIUM* :

*Lucrum ingens facio, praeterquam mihi meus pater
Dedit aestimatas merces, ita peculium
Conficio grande* ⁷.

⁷ Plaut. Mercat. Prol. 95.

By *Peculium* was understood the very opposite of *Patrimony*. For as a Son, during his Subjection, could not be seized of *Patrimony*, so on the other hand, no *P. fam.* was capable of *Peculium*.

P. familias liber peculium non potest habere, quemadmodum nec servus bona ⁸.

⁸ D. 50. 16. 182.

⁹ Dig. Lib. XV. Tit. I.

Peculium therefore⁹, with reference to a Son, was *Universitas Bonorum, quam Filiusfam. Patris* [with regard to a Slave, *quam Servus Domini*] *voluntate, a paternis [vel dominicis] rationibus distinctam et separatam possidebat* ¹.

¹ D. 15. 1. 1. 4. § 5. eod. l. 5. § 4. eod.

Vet. Glossae,

Peculium. Κεῖσιν τὲ ἐν ἀλλοτρίᾳ ἐξουσία ὄντος, τὲτ' ἐς, οὐκ ἢ δέλε.

² C. 3. 28. 37.

The *Peculium* of the Son was divided into *Military* and *Pagan* ². The Meaning of which is this: As the Army was the National Profession, it was of Consequence the most creditable, and the most distinguished with Honours and Emoluments. One of which Emoluments was, that whatever the Son acquired by the Service, nay, whatever was conferred upon him by his Father or Friends to qualify him for it ³, He acquired to his own absolute Use and Property, and in that Estate was considered as a *P. fam.*, and had all the Rights of such ⁴.

⁴ Dig. Lib. XLIX. Tit. XVII. De Castrensi Peculio.

⁵ Juvenal. XV. 52.

*Nam quae sunt parta labore
Militiae, placuit non esse in corpore census,
Omne tenet cujus regimen Pater* ⁵.

⁶ J. 2. 12. pr.

He could dispose of such by Will, and, as He was here in the Capacity of a *P. fam.* the Inheritance by the general Disposition of Law belonged to this Heirs, and not to his Father ⁶.

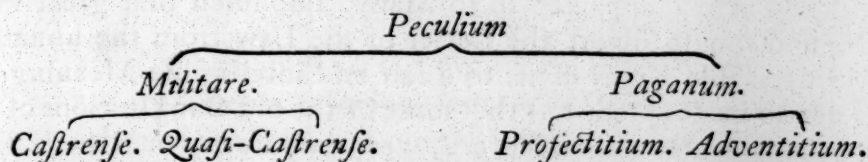
This therefore was called *Peculium Militare*, or, more frequently indeed, *Castrense*. And whatever *Peculium*, or private Property, was not of this Cast, was called, by an old and well known Distinction, *Pagan*. For with the Romans whatever was not *Military*, however honourable, or however creditable, was comprehended under that Expression. Just as we distinguish in common Speech, between *Natural* and *Moral*, as if whatever was not the Former, must be the Latter. So we talk of *Moral* Evidence, of Things being *Morally* impossible, &c.

The *Peculium Paganum* therefore was *Filii non militantis*: whatever he became seized of by any other measure than the Profession of Arms. Between

tween these, if I was to follow the Emperor⁷, I could insert a *Peculium*⁷ C. 3. 28. 37. of a middle nature.

Vel enim Paganum est Peculium, vel Castrense, vel, quod medietatem inter utrumque obtinet, quod Quasi-Castrense nuncupatur.

But I rather chuse to consider it thus,



The *Quasi-Castrense* was Fiction upon Fiction. Whatever was acquired, *ratione Forensis Militiae* (as there is not-an-imperfect Relation between these two kinds of Controversy⁸) in short all Salaries, Stipends, Fees and Emoluments arising from any of the liberal Professions, was considered in the same Light, as what was earned in the service of the Public: and both Estates were enjoyed exactly in the same manner, at least to all purposes that we have any occasion to be concerned about.

And as for the rest we only need to be just acquainted with their Distinction and Description.

The *Peculium Paganum* or *Non-Militare* was either *Profectitious*, viz. *Quod ex re, vel occasione, aut contemplatione Patris ad Filium proficiscitur*; or *Adventitious*, Such as came not *ex Re Patris*, but by some other means, as the Mother's Estate, &c.

The Rights of these differed much as to the Considerations and Nature of Enjoyment, Property, Usufruct, Inheritance, &c. but are of little concern to those that live under a different Administration of Law.

2. Another Power, which the Roman Father was possessed of, is represented as a very considerable one, and attended with some extraordinary circumstances. The account, which *Dionysius Halicarnassensis* gives of it⁹, is as follows:

⁹ II. 27.

“ The Lawgiver of the Romans did not stop here [*He means the power of Life and Death, for he recites That first, and then proceeds with This*]
 “ but gave the Father a Right to make Money of his Son, to carry him
 “ to Market, till he had gone through his Hands three Times: which
 “ made the Condition of the Son much harder than that of a Slave. This
 “ was so considerable a Law, that, though of Regal Extraction, and of a
 “ Tyrannical Complexion, it was adopted by the *Decemviri*, and passed
 “ under the Notion of a constitutional Principle, or one of the *Mores Patrii*
 “ into the XII. Tables, where it stood in the fourth Title or Section.
 “ ἐν ἐπόλμῃσαν ἀνελεῖν. These Legislators durst not drop it. Nor can anyone
 “ say, it was of their own framing. For it must be as old as the Foundation
 “ of their City, because We find it explained and amended by Numa, who
 “ suo-

⁸ Above, pag. 9.

"succeeded the Founder in the Government. For by his Constitution
 "those Fathers were denied this Power when they had once given the
 "Son their Consent to marry, and bring a Wife into the Family."

This Right inherent in a Roman Father must at first sight appear to all Readers, very strange and unnatural, and to some perhaps ridiculous. Indeed it has appeared so to Many, insomuch that great Pains have been taken to divert the Letter of the Law from the unnatural and unconceivable Rigor of it, to a fair and intelligible Meaning.

It is not to be doubted, but that some of the old Constitutions of this Country, as they stand upon Record, were only Forms or Rituals, some Ceremonials attending a solemn and legal Act, and which to us at this Distance may carry no Sense or Meaning, or perhaps a harsh and absurd one. The *Testamentum per aes et libram*, which required an imaginary Deed of Bargain and Sale, and the Attendance of several Characters to assist in the Operation, was possibly of this allegorical and shadowy Sort. The *Furtum per Lancem et Licium conceptum*, as it is called, (but, I think, not rightly) may possibly have been another. This has been the Subject of many Conjectures, and many Hypotheses² have been produced upon it, most of them differing from those that went before, and all possibly from the Truth and Meaning. And I will not contend with those, who have resolved this Act now under Consideration, into a peaceful and harmless Ceremony, which went along with *Emancipation*. Emancipation was an Act, dissolving the Family-Subjection, that by the Custom of his Country the Son was liable to, through the whole Period of his Father's Life, and from which neither Civil Power, Office or Dignity, could give him a legal Discharge, till *Justinian* thought fit to make some Abatements.

However, Those who love to refine upon the Mystery and Abstraction of Antiquity, may find some Check from what I observed formerly³ upon a very good Principle laid down in the Digest, in relation to this very Subject,

Non omnium, quae a Majoribus constituta sunt, ratio reddi potest.

It is unreasonable to grind down Antiquity to our own Size and Standard, and to imagine that no Construction shall suit their Meaning so well, as that which falls in with the present and popular way of Thinking.

If I have the Ill-fortune to be deemed of this Number, because I some time since endeavoured at a candid Interpretation of a Law, which carried Barbarity and Reproach along with the Mention of it; I cannot help it. Let the Good-nature of the Undertaking plead something in Excuse, if the Success of it will not amount to its Justification. When I took upon myself this Defence, I found that Many of the old Roman Lawyers confessed very early, that there were several Things in that Legislation which were not to be accounted for upon common Principles. And after this the Authority of *Gellius* was of little Weight with me. I never looked upon him

² Amerbachii
 Epistola ad
 Alciatum, in
 Thes. Cl.
 Meerman. T.
 VII.

Pithoei Subfi-
 civ. I. 2. apud
 Gruter. F. A.
 T. II.
 Beyerlinck.
 T. II. p. 640.
 F.

Galvanus de
 Usufructu,
 Cap. XV.

M. Tatius Al-
 pinus, ad cal-
 cem Institut.
 ex edit. Jani a
 Costa. Traj.
 1714. 4. et in
 Thesaur. Cl.
 Meermannii
 T. VII.

Abr. Wieling.
 Marp. 1719. 8.
 Anon. Helm-
 stad. 1721. 4.
 Heinec. An-
 tiqq. Rom.
 T. II. p. 167.

³ Above, pag.
 45.

him in the Light of a Lawyer, and (though I profess a great Reverence, to say no more, for the Writers of Antiquity) I could never consider him as very great in the Capacity of a Critic : who has left this Grammatical Problem behind him, as an Exercise, or Tryal of Genius, which is not beyond the Reach or Penetration of an ordinary School-Boy :

Cum de natura atque ordine literarum differeret [Nigidius] quas Grammatici Vocales appellant, verba haec scripsit, quae reliquimus inenarrata ad exercendam legentium intentionem :

A et O semper principes sunt: I et V semper subditae: E subit et praeit. In Euripo praeit, subit in AEmilio. Si quis putat praeire V in his verbis, Valerius, Vennonius, Volusius; aut I in his, Jampridem, Jecur, Jocum, Jucundum, errabit, quod hae literae cum praeceunt, ne vocales quidem sunt⁴.

⁴ Gell. XIX.
14.

However Gellius has his Merits, which I would not be understood to dispute by any thing I have here said.

If I was to account for any Rule of Law, which carried with it a seeming Impropriety, the best Test will be, not the Conceit of lower Ages, or the Cast of popular Apprehensions, but the Manner and Discipline of those Times, where these Customs had their Original, and possibly a proper Consistency. And this is one of those Considerations, that makes the Knowledge of Antiquity so useful (some may be willing to add, so necessary) to a Lawyer. Sir H. Spelman somewhere condemns the Common Lawyers of his own Time, for the small Acquaintance they had with the Principles and Rationale of their Profession. "We are all for Profit," says He, "and *lucrando pane*, taking what We find at Market, without enquiring whence it came."

That great Writer upon these Principles attempts to account for a seemingly odd Practice attending the Jury in our Courts of Law; who, after Evidence given, are denied the Use of Meat and Drink, *etc.* till they conclude in their Verdict. The vulgar Conjectures upon this Head are most of them insipid and unsatisfactory. Sir Henry gives it a very probable Turn, which He confirms by several Capitularies, and Laws of many Nations, who had a common Original with us,

Vt Judices [and such are our Jurors] jejuni causas audiant et decernant⁵.

The Intemperance of our Northern Ancestors, He imagines to have given occasion to these Restraints. For though Ennius, as it is said of him,⁴

⁵ LL. Longobard. Lib. II.
Tit. LII. Cap.

*nunquam nisi potus ad Arma
Profluit dicenda —*

yet such a Temper and Situation of Mind would very ill suit with the Administration of Justice.

POWER OF THE FATHER.

But it is of higher Date, than where He sets it :

*Haec est Causa Debiti inter Fidejussorem et Debitorem : ideoque respondere non teneor post Meridiem, cum nulla causa post Meridiem orari debet*⁶.

⁶ LL. Wallicae Hoel. Dda. Lib. V. Cap. II. § 48.

It was also the Practice of the Romans,

Η μεσημερία πέρας ἐς τοῖς πολλοῖς τῷ τὰ δημόσια καὶ σπενδαῖα πράττειν⁷.*

⁷ Plutarch. Quaest. Rom. 84.

*Quidam medio die interjunxerunt, et in postmeridianas horas aliquid levioris operae distulerunt. Majores quoque nostri novam relationem post horam decimam in Senatu fieri vetabant*⁸.

⁸ Senec. de Tranquil. Animi, fin.

Nay, it is as high as Homer :

ἐλδομένω δέ μοι ἦλθεν
Οψ· ἦμος δ' ἐπὶ δόρπον ἀνὴρ ἀγορῆθεν ἀνέστη,
Κρίνων νεῖκεα πολλὰ δικαζομένων αἰζηῶν⁹.†

⁹ Homer. Odyf. M. 438.

This explains that Conceit of the Epigram (see my Translation of it in the Margin),

Εἰ ὦραι μόχθοις ἱκανώταται· αἱ δὲ μετ' αὐτὰς
Γράμμασι δεικνύμεναι ΖΗΘΙ λέγασσι βροτοῖς¹.||

¹ Antholog. Lib. I. Cap. ult.

There is a Decency and a Propriety, that Matters of great Regard should be transacted in the Youth and Spring of the Day, at a Time when the Judgment is the least clouded, and the Faculties of the Mind are in their best Vigor and Activity.

Thus the Solemnization of Matrimony with us, an Act of a very serious and important Nature, is confined to that Time of the Day, and is not, in that respect, dispensed with by the common Ordinary. And in a Synod held at *Winchester*, A. 1308. it was required, That the Bride and Bridegroom should be fasting, when they made their Matrimonial Vow.

*Item, quia in Personis Ebrüis legitimus dici non debet Consensus, inhibemus, ne in Tabernis per quaecunque verba, aut nisi jejuna saliva, Vir aut Mulier de contrahendo Matrimonio sibi invicem fidem dare praesumant*².

² Wilkins, Concil. T. II. pag. 295.

* Meridies plurimis est terminus et meta rerum publicarum et seriarum conficiendarum.

† What time the Judge forsakes the noisy Bar
To take Repast, and stills the wordy War. POPE.

|| Sex Horae laboribus sufficiunt : quae vero proxime sequuntur, [sc. Z. VII^{ma}.
H. VIII^{va}.
Θ. IX^{ta}.
I. X^{ma}.

To

To return to my point, which was the *Liberorum Venumdatio*, the Authors to be consulted are these that follow; viz. *Ulpian*¹, *Marcilius*² Tit. X. and *Rittersbusius*³, *Nannius*⁴, *Sigonius*⁵, *Gravina*⁶, *Heineccius*⁷, *D'Arnaud*⁸, besides many Others, who have touched upon it occasionally.

If it is to be understood of some Rite or Form attending Emancipation, which was the Suspicion of many excellent Lawyers long ago, I should think it was alluded to in these Words of the Emperor⁹:

Praeterea Emancipatione quoque definunt liberi in Potestate Parentum esse. Sed Emancipatio antea — per antiquam legis observationem procedebat, quae per imaginarias venditiones et intercedentes manumissiones celebrabatur.

Caius, in what is left us of his *Institutes*¹, is more express and particular:

Item per Emancipationem Filii sui juris efficiuntur. Sed Filius masculus tribus Emancipationibus de Potestate Patris exit, et sui juris efficitur. Mancipatio autem, hoc est, Manus Traditio, quaedam similitudo Venditionis est: quia et in Emancipationibus praeter illum, hoc est, certum patrem, alius pater adhibetur, qui fiduciarius nominatur. Ergo iste naturalis pater filium suum fiduciario patri mancipat, hoc est, manu tradit: a quo fiduciario patre naturalis pater unum aut duos nummos, quasi in similitudinem precii accipit, et iterum eum, acceptis nummis, fiduciario patri tradit. Hoc secundo et tertio fit, et sic de patris potestate exit. Quae tamen Mancipatio solebat ante Praesidem fieri, modo ante Curiam facienda est: ubi quinque testes, cives Romani, in praesenti erunt, et pro illo, qui Libripens appellatur, id est, stateram tenens, et qui Antestatus appellatur, alii duo, ut septem testium numerus impleatur. Tamen cum tertio mancipatus fuerit filius a patre naturali fiduciario patri, hoc agere debet naturalis pater, ut ei a fiduciario patre remancipetur, et a naturali patre manumittatur: ut si filius ille mortuus fuerit, ei in hereditate naturalis pater, non fiduciarius, succedat.

And indeed, if it is otherwise, how shall We account for the following Words of the Emperor *Constantine*¹, who asserts that the *Patria Potestas*² C. 8. 47. ult. was never raised so high, even in the Zenith of its Authority, as to effect the *Liberty* of the Children: Which with good reason all their Books call *Res Inaestimabilis*? But here follow those Words of the Code:

Libertati a majoribus tantum impensum est, ut Patribus, quibus Jus Vitae in Liberos Necisque Potestas olim erat permessa, libertatem eripere non liceret.

And yet very low down in the Empire, *Egestas* was allowed a good Plea for selling a Child, as We may see in the same Code³.

E e e

But

⁴ C. 4. 43. 2.

¹ Tit. X.

² on the XII. Tables.

³ X. Miscell. 5.

⁴ de Jure Civ. Rom. l. 10.

⁵ Orig. J. C. II. 25.

⁶ Antiq. Rom. l. 9.

⁷ Var. Con- ject. I. 24.

⁸ J. 1. 12. 6.

⁹ I. 6. 4.

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But I know to this it will be answered, that by Sale the Liberty was only smothered for a while, not extinguished. For the Slave who was manumitted, became a *Libertinus* only, the Son came out *Ingenuus*. A Privilege which Manumission could not convey, though it might disclose or unfold it. And moreover, the Defenders of the Letter will be apt to say, what is often said upon these Occasions, that the Practice, such as We have just now seen it in *Caius*, was not according to the original Institution, but came in the Place of it, when either the Rigour, or the Absurdity of the Fact compelled their Fore-fathers to lay it aside. And indeed, upon the Matter, nothing can be given as certain. For, as this Power, be it what it will, had its Origin in Greece, it must first be accounted for there : and it must be confessed, that at this Distance of Time there are several Points in those Constitutions, which will not easily admit of a satisfactory Explication.

(3). Another Power, which was much more considerable, is much less controverted, the Power of Life and Death. Take the Account given of it by *Dionysius* :

^s II. 26.

“ *Romulus* gave the Father an unlimited Power over his Children. He “ could confine them, beat them, employ them in the most laborious “ Services, and, in short, could put them to Death. Although these Sons, “ at that very time, were employed in the Service of their Country, or “ had received the Acknowledgments of that Country, in the Honours “ She had to bestow. Upon which account it has happen’d, that when “ some extraordinary Persons have been making a popular Harangue, and “ not very favourable to the Interests of the Senate, They have been “ forced from the *Rostra* by their Fathers, and put to Death by them in “ what manner they pleased : and not a Magistrate has dared to inter- “ pose. I need not mention the military Executions of this Sort. The “ Story of *Manlius Torquatus*, and Others, are upon Record.”

Thus the Form of Adoption ran :

AVCTORNE ESSES, VT IN TE P. FONTEIVS VITAE NE-
CISQVE POTESTATEM HABERET VT IN FILIO*?

And this is what made the same Writer in the same Oration^s observe:

Patrem Tuum, Civem optimum, clarissimi Viri filium : qui, si viveret, qua severitate fuit, Tu profecto non viveres.

This Power therefore cannot be disputed, as the Instances of it are frequent. So *Manlius*⁶ put his Son to Death for fighting against Orders, though victorious. For, as *Paulus* writes⁷,

Disciplina castrorum antiquior fuit Parentibus Romanis, quam Charitas liberorum.

Before the Instance of *Manlius* some have imagined a similar one of *A. Postumius* the Dictator : which yet *Livy* doubts of⁸.

* Cic pro
Domo, § 29.

^s § 32.

⁶ Liv. VII. 7.

Add. Salust.

Catilin. 56.

Flor I. 14.

Gell. IX. 7.

Orof. III. 9.

Valer. Max.

V. 8.

Dion. Halic.

VIII. 79.

Aurelius

Victor, n. 28.

Cicero l. de

Fin. 17.

⁷ D. 49 15. 19.

⁸ Liv. 29.

A very remarkable Instance of this Sovereignty occurs in the Progress of Cataline's Conspiracy :

Fuere extra Conjuratorem complures, qui ad Catilinam initio profecti sunt. In his erat Fulvius, Senatoris F. quem retractum ex itinere Parens necari jussit ⁹.

⁹ Sallust. B. Catilin. c. 39. V. 8 ult.

Valerius Maximus records the same Story¹, and adds, that the Execution was prefaced with these Words :

Non se Catilinae illum adversus Patriam, sed Patriae adversus Catilinam genuisse.

And the Account given of the same Fact by Dion Cassius² is worth citing : ² XXXVII.

Αὐλον δὲ Φάλκιον, ἄνδρα βελευτήν, αὐτὸς ὁ πατὴρ ἀπέσφαξεν, ἔτι γε καὶ ³⁶ μόνον (ὥσγε τισὶ δοκεῖ) τῆτ' ἐν ἰδιωτεῖα ποιήσας. Συχνοὶ γὰρ δὴ καὶ ἄλλοι, ἔχ' ὅτι ὑπάροι, ἀλλὰ καὶ ἰδιῶται παίδας σφῶν ἀπέκλειναν*.

I find this Act of the Father greatly resented, when attended with any Shew of Cruelty, or Marks of an arbitrary Temper.

Erixonem Eq. R. memoria nostra, quia filium suum flagellis occiderat, populus in foro graphiis confodit. Vix illum Augusti Caesaris Auctoritas infestis tam patrum quam filiorum manibus eripuit ³.

³ Senec. I. de Clement. 14.

And let my Reader carry with Him the Remark, that This was not an absolute Licence of Power to be executed in a wanton or lawless, in an arbitrary or uncontrollable Manner, at Discretion, at Mercy, and *pro libitu*. It appears generally to have been a regular Jurisdiction : where the Domestic Magistrate⁴ sat in Judgment, instead of the Civil one.

⁴ Dion. Halic. III. 22.

Recognitione Equitum, Juvenem, probri plenum, sed quem pater probatissimum sibi adfirmabat, sine ignominia dimisit, habere dicens Censorem suum ⁵.

⁵ Sueton. Claud. 16.

To begin with the Author I was obliged to lately :

Cogniturus de Filio T. Arius, advocavit in Concilium Caesarem Augustum. Venit in privatos penates: affedit: pars alieni concilii fuit. Non dixit, Immo in meam domum veniat. Quod si factum esset, Caesaris futura erat Cognitio, non Patris. Audita causa, excussisque omnibus, et his quae adolescens pro se dixerat, et his, quibus arguebatur, petit, ut sententiam suam quisque scriberet, ne ea omnium fieret, quae Caesaris fuisset ⁶.

⁶ Senec. I. de Clement. 15.

There cannot be larger Assurances of a legal Judicatory. Assessors (one We are assured of, possibly all) of great Distinction, Character, and Authority. A solemn Consistory : the Limits of the Jurisdiction ascertained : Appearance given : Plea, Informations, and Sentence.

* A. vero Fulvium Senatorem [rather Senatoris filium] ipse Pater necavit. Nec tamen, ut quibusdam videtur, sine exemplo cum privatus esset [that is, sine magistratu] hoc fecit. Nam et alii multi, non tantum Consules, verum omnino privati homines, suos filios interemerunt.

To these may be added the Case

of *Spurius Cassius*⁷
of [another] *T. Manlius*⁸,
of *L. Gellius*⁹,
of *Fabius Eburnus*¹.

Which are attended with the Expressions, — *cognita domi causa — Concilio necessariorum — adhibito propinquorum Concilio — decreto propinquorum — inspecta diligentissime causa — diligentissime auditis testibus — cognitione suscepta domi consedit*, etc. Which plainly shew the Nature and Tenor of the Process².

All this is agreeable to the Roman Constitution, as well as to Reason:

*Neque enim inaudita causa quenquam damnari Aequitatis Ratio patitur*³.

*Interfici indemnatum quemcunque hominem etiam XII. Tabb. decreta vetuerunt*⁴.

*Vos appello, Leges, Judicesque Romani. Nempe post patrata facinora, nec quenquam scelestum indemnatum impune voluistis occidi*⁵.

To this may be added an Argument *a Fortiori*: That if *Romulus* did not allow a Father to expose a monstrous Birth, without impannelling a Jury of the Neighbourhood⁶, much less would he confer upon him a Power so unlimited and so arbitrary, over the Body of a Roman.

Lastly, *Seneca* speaks of it as an Instance of Magistracy, not Tyranny:

*Quia utile est Juventuti regi, imposuimus illi quasi domesticos magistratus, sub quorum custodia contineretur*⁷.

It must not however be dissembled, that several Instances of this Paternal Power were transacted without the Forms of Justice, as far as appears to us; as the Case of *Manlius*, and *Fulvius* lately produced.

To which may be added that of *Pontius Aufidianus*⁸, of *P. Atilius Philiscus*⁹, and of *Fabius Censorius*¹.

I will add one Instance more from *Plutarch*², which is that of *Cassius Brutus*, who in the Latine War treated with the Enemy about betraying his Country, and opening to them the Gates of the City:

— φαραβείς δὲ εἰς ναὸν ἔφυγεν Ἀθηναῖς Αὐξιληρίας. Κάσσιος δὲ σιγνίφει ὁ πατήρ αὐτῆς κατέκλεισε, καὶ λιμῶν διέφθειρε, καὶ ἄταφον ἔρριψεν*.

A Story fit to be matched with that of *Pausanias*³; and *Plutarch* in his Zeal for Parallelism could not miss it. But there his Author [*Chrysermus*] differs from other Writers in some Particulars. It was the Mother of *Pausanias*, if the best Accounts can be credited, and not the Father, with *Chrysermus*; nor was the Father of *Pausanias* called *Agefilaus*.

* — deprehensus vero confugit ad templum Minervae Auxiliatricis. Cassius vero pater, qui signifer fuit, inclusit, et fame necavit, et inbumatum projecit.

⁷ Dion. Halic. VIII. 79.
Liv. II. 41.
Flor. I. 26.
Valer. Max. V. 8. 2.

⁸ Id. Valer. V. 8. 3.
Epitom. Liv. lib. 54. 3.
Cic. I. de Fin. 17.

⁹ Id. Valer. V. 9. 1.

¹ Quintilian. Declam. III. 17.

² See above, pag. 358.

³ D. 48. 17. 1. pr.

⁴ Salvian. I. 8. de Provident. Dei.

⁵ Augustin. I. de C. D. 19. Add Aët. XXV. 16.

Dion. Halic. III. 22.

⁶ Dion. Halic. II. 15.

⁷ III. de Benef. 31.

⁸ Valer. Max. VI. 1. 3.

⁹ Id. ibid. n. 6.

¹ Oros. IV. 13.

² Parallel. Gr. et Rom. X.

³ Nepos in vita, c. 5.

I need not inform the Reader of Antiquity, that a Spartan Mother, in public Spirit, could rival a Roman Father.

I cannot close this particular Article of the Domestic Sovereignty, without referring those, who want farther Information upon the Subject, to a Treatise composed by *Bynkershoek*, and entitled, *De Jure Occidendi, Vendendi, et Exponendi liberos apud Veteres Romanos*⁴. And moreover, as to the Liberty particularly, which the Ancients took in *Exposing* their Children, that is adjusted with great Accuracy by *Ger. Noodt* in a singular Treatise, intitled *Julius Paulus, sive de Partus Expositione et Nece apud Veteres*.

⁴Opuſc. Tom. II. Halae, 1729. 4^o

But it is time to conclude this Chapter, which I shall do with observing how this Roman Principle in Process of Time lost its Rigour and Severity.

It has been imagined, that It had abated before the *Lex Julia* of *Augustus*, which gave the Father a Power of killing his Daughter taken in Adultery. For, as a good Civilian argues, where was the Necessity of creating this Authority by an expreſs Statute, if He was poſſeſſed of it before? And if the *Power* of the Father could give it him, He had it before.

*Patri datur Jus occidendi adulterum cum filia, quam in potestate habet. Itaque nemo alius ex patribus idem jure faciet. Sed nec filius-fam. Pater*⁵.

⁵D. 48. 5. 20.

*Sufficit Patri, si eo tempore habeat in potestate, quo occidit, non quo in matrimonio collocavit. Finge enim postea redactam in potestate*⁶.

⁶l. 23. § 1. cod.

But this is doubtful, as We have seen this Power alluded to by the Emperor *Claudius*. It was possibly dying away insensibly by silent Concurrence, and the Work of Time. The Refinement of Roman Manners, and the Article of Humanity, might wear it down, by checking the Practice, without disputing the Principle. And this is the Sentiment of some Civilians. Others again with *Cujacius*⁷ imagine, that when the Emperors became possessed of absolute Dominion, this Rival Jurisdiction was looked upon with an evil Eye, and therefore restrained by particular Constitutions. And it is the Conjecture of more than one, that when *Antoninus Pius* set bounds to the Power of the *Master*⁸, He could not possibly overlook that of the *Father*. But this I said was Conjecture.

⁷VI. Observ.

⁸J. I. 8. 2.

What follows is more certain: The Power of Life and Death was looked upon as obsolete, when *Paulus*⁹ the Lawyer and *Vlpian*¹ wrote.

⁹D. 28. 2. 11.

Paulus and *Vlpian* lived under *Severus Alexander*.

¹D. 48. 81. 2.

And that Emperor moreover in a Rescript to *Artemidorus* A. C. 228. disallows it:

*Si Filius tuus in potestate tua est, res acquisitas tibi alienare non potuit. Quem, si pietatem patri debitam non agnoscit, castigare jure patriae potestatis non prohiberis: acriori remedio usus, si in pari contumacia perseveraverit; eumque Praefidi Provinciae oblaturus, dicturo sententiam, quam Tu quoque dici volueris*².

²C. 8. 47. 3.

Fathers were restrained particularly from selling their Children, by the Emperors *Dioclesian* and *Maximian*³, about the beginning of the Fourth Century.

³C. 4. 43. 1.

About

About the Year 315, the Emperor *Constantine* directed an Edict to all the Cities of *Italy*, wherein He declared, that to prevent the Murder of Children, which was too frequent and scandalous, the Public should be bound to maintain the Children of those who were not able

*l. 1. C. The-
od. de alimen-
tis quae ino-
pes, etc.

to provide for them ⁴.

In the Year 319. He laid the Ax to the Root, and made it Capital :

Si quis Parentis aut Filii, aut omnino Adfectionis ejus, quae nuncupatione parricidii continetur, fata properaverit, sive clam, sive palam id ensus fuerit, poena parricidii teneatur, et neque gladio, neque ignibus, neque ulli alii solenni poenae subjugetur : sed insutus culco, cum cane et gallo gallinaceo et vipera et simia, et inter eas ferales angustias comprehensus serpentium contuberniis misceatur : et, ut regionis qualitas tulerit, vel in vicinum mare, vel in amnem projiciatur, ut omni elementorum usu vivus carere incipiat, et ei coelum supersit, terra mortuo auferatur ⁵.

⁵C.9.17.unic.

All this related to grown Children. Exposing the *recens natos* and *sanguinolentos* was yet in Practice. This the same Emperor also restrained by a Constitution A. 331 ⁶.

*l. 1. C. The-
od. de Expo-
sitis.

A. 365. *Valentinian* and *Valens*, by a Constitution conferring, or possibly confirming, the *Patria Potestas* to others besides the Father, such as Uncles and other Relations, seem to confine that Power to moderate Correction only—*Quod si Atrocitas facti jus domesticae emendationis excedat, placet enormis delicti reos dedi Judicum notioni* ⁷.

⁷C.9.15.unic.

A. 374. Exposing and Killing Infants was made Capital, under the Emperors *Valentinian*, *Valens*, and *Gratian* ⁸.

*C. 8. 52. 2.
9. 16. 8.

And lastly, We find that the remaining Instance of this extraordinary Authority, which was *filium in noxam dare*, had been compleatly abolished before the Time of *Justinian*. The Meaning of which is this: viz. In Damages and Trespases, committed by Son or Slave, who had no Head in the State, and against whom therefore there lay no Action, the Father or Master was conventable only, and to make good the Damage, or deliver up the Party offending; whose personal Service was to make Satisfaction. This in the Son was illiberal at least, but giving up a Daughter was abominable, therefore very justly discontinued.

Quis enim patiatur Filium suum, et maxime Filiam, in noxam alii dari: ut pene per filii corpus pater magis quam filius periclitetur: cum in filiabus etiam pudicitiae favor hoc bene excludat. Et ideo placuit in servos tantummodo noxales actiones esse proponendas: cum apud veteres legum commentatores invenerimus saepius dictum ipsos filiosfam. pro suis delictis posse conveniri ⁹.

⁹J. 4 8. ult.

SERVITUDE.

Grotius II. 5. III. 7.

Pufendorf. VI. 3.

Popma de Operis Servorum. Lugd. Bat. 1672. 8.

Loon de Manumissione Servorum. Vltraj. 1685. 12.

Pignorius de Servis. Amst. 1693. 4.

Arnisaeus de Repub. I. 3.

Anton. Borremansii Var. Lect. Cap. XIV.

THE Third and last Relation in regard to *Persons*, is *Servitude*; or with the Ancients, *Slavery*.

*Servitus est Constitutio Juris Gentium, qua quis dominio alieno contra naturam subicitur*¹.

¹ J. I. 3. 2.
D. I. 5. 4. 1.

I said the last Relation, though *Justinian* has included in his Consideration of *Persons*, the Subject of *Guardians* and other Characters: for which He has been corrected. And that Matter is thus to be understood. When the Roman Law contemplates and classes Mankind, it considers their *State or Condition*². Now if it be asked what is here intended by *State*, it is plain, that We must understand a Situation of Life, the Alteration of which would likewise create an Alteration in Law. Mankind therefore is regularly distributed into *Bond and Free*, into *Personas sui juris, et Personas alieno juri subjectas*: and that *Alienum Jus* again is either *Paternum or Dominicum*³. This is all which that Title in the Digest pretends to, and These are all the Characters which the Law considers. The *State* of Magistrate, Judge, Soldier, Guardian, Senator, *etc.* is quite another Thing; and a Person vested with any of these Appendages, is not more a *Citizen*, or more a *Homo liber*, than He was in his private Capacity. The First is properly the *State*, the *Ratio* of his Existence: the Other, only a *Function*, accidentally accruing to that State or Condition. Just as the Law pronounces of Slaves, *Servorum nulla est Differentia*, that is *Qua-Servus*; yet Those that found the Use, and enjoy'd the Property, of them, made a great Distinction *ratione Ministerii et Officii*: so that *there* indeed, according to the Iambic,

Δῆλος πρὸ Δέλε, Δεσπότης πρὸ Δεσπότη *

when it was at the same time, universally and legally true, that they were all *one* Set or Head of People, without any Difference⁴.

⁴ J. I. 3. 5.

* *Servus ante Servum, Herus ante Herum.*

The *Persona* therefore, or Character, of a Magistrate, Guardian, *etc.* was in Life, what the *Persona* was on the Stage; a Character to put on and off; a convenient Method of Considering, an useful Way of Conceiving, such or such a Citizen, in order to carry on the Business of the Public more advantageously, but did not enter into the Legal Notion of his real Circumstances or Condition. Whereas, on the other hand, the Difference between a Father of a Family, and the Son of it, between being a Slave, and *not* being a Slave, is something intrinsic in regard to the Circumstance and Operation of Law, and in which the Legal Apprehension of Mankind is greatly interested. For let us but view it thus: During that State of Subjection, the Law allows them no Rank

^{D. 28 8.1.pr.} or Consideration ³. A Slave that died in his Servitude was the same ^{50. 17. 32.} with a Person that never existed. But let that Slave obtain his Liberty, or the Son be made *sui Juris*, He is then acknowledged; and forasmuch as He cannot (ordinarily) either plead or be pleaded for any thing that passed in the State of his *Prae-existence*, He seems to come into Civil Life, as one born into the Natural, who perceived nothing, was intitled to nothing, till He arrived at that Period of Being.

I say, that the *Law of Nations* leads us to these Considerations in the case of a Slave, and the *Civil Law* in regard to a Son. For in conformity to my Definition (which I look upon as my Text) in a *natural Contemplation*, as well as in the Sight of God, there is no *Προσωποληψία*,

^{*Galat. III. 28.} there is neither *Bond nor Free* ^{Coloss. III. 11.}. Thus all the Lawyers write,

Quod attinet ad Jus Civile, Servi pro nullis habentur: non tamen et Jure Naturali, quia, quod ad Jus Naturale attinet, omnes homines aequales sunt ⁵.

^{5D. 50. 17. 32.}

Libertas naturali Jure continetur, et Dominatio ex Gentium Jure introducta est ⁶.

^{*D. 12. 6. 64.}

Natura Servum et Liberum ab initio non discrevit, sed liberam hominis fecit prolem ⁷.

^{7Nov. 74. 1.}

Natura siquidem ab initio, dum de filiorum procreatione sanciret, scriptis nondum positis legibus omnes similiter quidem liberos, similiter autem produxit ingenuos ⁸.

^{*N. 89. 1.}

In Liberis Natura quidem fecit liberos omnes, Bella vero servitutem adinvenerunt ⁹.

^{9c. 9. eod.}

Quid est Eques Romanus, aut Libertinus, aut Servus? Nomina aut ex Ambitione, aut ex Injuria nata ¹.

^{1Senec. Epist.}

Albutius dixit: Neminem natum liberum esse, neminem servum Haec postea nomina singulis imposuisse Fortunam ².

<sup>2Id. I. 3. Con-
110v.</sup>

And upon this Principle it was, that Slaves were subject to all the Laws of Nature, like other Men. For that Law, which denied them Liberty, could

could not deny them the Rights, nor absolve them from the Obligations, of their *Nature*.

*Civilis Ratio civilia quidem jura corrumpere potest, naturalia vero non utique*³.

*Nec enim Naturalis Ratio auctoritate Senatus commutari potuit*⁴.

Thus they might be guilty of Parricide :

*Item nec Lex Pompeia parricidii : quoniam caput primum eos adprehendit, qui parentes, cognatosve, aut patronos occiderint ; quae in servos, quantum ad verba pertinet, non cadunt, sed, cum natura est communis, similiter et in eos animadvertetur*⁵.

And again, though the Roman Law did not allow the Slaves the Consideration of Marriage (and therefore no Action for Adultery, in consequence) yet *natural Incest* was considered. *Serviles quoque Cognationes observandae sunt*⁶ ; and such Conjunctions were abominable, *quoniam in contrahendis matrimoniis naturale Jus et Pudor inspicendus est*⁷.

It may be asked, if the Law of Nature declares so much in favour of *Liberty*, how shall We reconcile it with the Law of Nations (which sets up for the Law of Nature also) the avowed Parent of the contrary Principle, the Article of *Slavery* ? *Contra Naturam subjicitur*⁸. This has in some measure been considered above⁹, where We have seen, how the Law of Nature can admit of Alteration, and yet remain the Law of Nature still. Had Liberty been a *Positive Precept* of Nature, the Consent or Concurrence of all the Nations in the World could work no Change, nor introduce a Contradiction to it. Just as it fares with Property. Property had been absurd and unnatural, if a Community of Goods, which We hold to be the Law of Nature, had been the Law of Nature, in the strict and rigorous, in the *Positive* and *Preceptive*, Sense of it. But both Servitude and Property are very consistent with that Law, if We take it in its open and extended (or what the Schoolmen love to call the *Negative*) Sense : viz. something not enjoined us, but allowed us : something which implies no Contradiction in the Supposition, and supports nothing that is contrary to our *natural* Apprehensions.

My Reader will perceive, that I have been all along considering this Subject of *Servitude*, rather in the Light of the ancient *Slavery*. As I have indeed, in a former Part of this Work¹⁰ also, closed in with the Ancients in their Idea of it ; since it may be proper sometimes to enter for a while into their Mistakes, if that can contribute to our better Apprehension of them, when they are right. But the Relation of Master and Servant is better established upon the Plan, which I sketched out in my Considerations upon PERSONS, according to the Position of *Hesiod*¹¹,

Οἶκον μὲν πρώτιστα, γυναῖκα τε, βέν τ' ἀροτῆρα.*

* *Domum quidem primum, tum uxorem, tum bovem aratorem.*

Nothing is so obvious and so natural, as the whole Process of this Relation.

In the little Empire of a private Family, consisting of a *Sovereign*, or *P. familias*, and his *Subjects*, viz. his Wife, and Children, the first Consideration which offers itself, is, that this *P. fam.* was not born *sibi soli*,
 * Cic. I. Offic. *sed conjugi, liberis, ceterisque, quos caros habet, tuerique debet*. For the
 † purpose therefore of discharging these Functions, He calls in the Aid, and avails himself, of the Strength, the Speed, or any other Perfection of those Animals, that Nature has strewed round him, and intended for his Assistance :

cum frigida parvas

*Praeberet Spelunca domos; ignemque, laremque,
 Et Pecus, et Dominos communi cluderet umbra* †.

* Juvenal. VI.
 Sat. pr.

* Aristot. I.
 Polit. init.

When this Oeconomical Government grew more considerable : when Arts were cultivated, and Property began to be dealt out more unequally : when Wants were multiplied with the better Sort, and the Indigent were reduced to a kind of Necessity, or a Conveniency at least, of bartering their Labour for their Sustenance ; the Face of Things was somewhat changed. The Ox, which was the Poor Man's Officer, *ὁ γὰρ [βῦς] ἀντ' οἰκίᾳ τοῖς πένοντι ἐστίν**, now mixed his Services with the Plowman, the Thresher, and the Husbandman. Titius wanted Hands, and Maevius Support, which led these two to form a Contract of *Locati Conducti*, the One of *Do ut Facias*, the Other *Facio ut Des*, and by this means classed Mankind into two Distributions, and gave rise to the *Dominium Herile*, or this Stipulation, viz. That the Wealthy and more Fortunate should administer Food, Raiment, Covering, Protection, or Hire : and the other contract to undertake all proper Labours and reasonable Employment, as their own Functions and Abilities, and their Masters' Wants and Services, should direct them.

* Tit. III.
 Princ. I.

† VI. 3.

* D. 50. 16.

230. 1. Add.

Donat. ad

Ter. Adelph.

U. 1. 28.

And therefore many of the Moderns, *Ant. Faber*°, *Pufendorf*†, and others, with very great Reason conclude against *Pomponius*, in his Etymology of Slavery ‡,

Servorum Appellatio ex eo fluxit, quod Imperatores nostri captivos vendere, ac per hoc servare, nec occidere solent.

For if War and Captivity did not lay the Foundation of Servitude, but what We have been considering, then is it plain, the Word is to be fetched not from *Servando*, but rather from *Serviando* ; from the Idea of being *useful* or *serviceable*.

Faber moreover is of Opinion, that the Etymology of the Lawyers is wrong, because then *Servitus* (which is in the Abstract, as Philosophers

* *Bas enim loco servi est indigentioribus.*

term it) would owe its Origination to *Servus* (in the Concrete) contrary to the Rule of Philosophical Etymology.

Cujacius, *Scaliger*, *Vossius*, *Martinus*, and others, go to work in a more Critical manner, and considering the Genius of the Roman Language, its AEolism, and method of Deduction from the Greek, incline us to believe there is something, in this respect, worth considering in these Lines of *Homer**,

οἱ δὲ τ' ὀπίσθεν
Κόπλοντες ὄρεσσι μετάρφρονον ἦδ' καὶ ὤμους,
ΕΙΠΕΡΟΝ εἰσανάγχεσι, πόνον τ' ἐχέμεν καὶ οἷζύν¹.*

⁹ Odyss. ε.
527.

¹ See Festus
V. ERITVDO.

For S with the Romans supplies the Digamma of the AEolians, as in *Semis*, *Sus*, *Super*, *Sub*, *Sylva*, etc. as well as V, in *Vis*, *Venter*, *Vinum*, *Vicus*, and many more². Here We have both, *Ερος ΕρFος* *Servus*.

² Priscian
col. 969.

The primitive Institution therefore of Servitude was not founded on War, but on voluntary Contract; though indeed the Fortune of War might greatly contribute to that Purpose, by rendering the Condition of many deplorable, and by that means inclining them to a State of Vassalage or Dependancy.

So that, to come round again in some measure to the Hypothesis of the Ancients, I can distinguish between *Servitutem Voluntariam et Invi- tam*, or, in other Words, *Mercenariam et Obnoxiam*.

Besides these two Sorts of Servants, viz. (I.) *Mercede conductos*, and (II.) *Bello captos*, I can see that Antiquity understood a (III^o) Sort, namely such, as Nature designed for that purpose, and therefore formed them accordingly; those namely, *quibus Animam dedit pro Sale, ne putrescerent*: or, as *Seneca* writes³, *quos in numerum pecorum et animalium redegit hebes natura et ignoratio Sui*.

³ De vita bea-
ta, cap. 5.

Ποσειδάωνιος δὲ φησιν, ὁ ἀπὸ τῆς Στοᾶς, ἐν τῇ τῶν ἱστοριῶν ἐνδεκάτῃ πολλές
τινας ἑαυτῶν ἐ δυνάμενες προϊσάσθαι, ΔΙΑ ΤΟ ΤΗΣ ΔΙΑΝΟΙΑΣ
ΑΣΘΕΝΕΣ, ἐπιδέναι ἑαυτὰς εἰς τὴν τῶν συνελωτέρων ὑπηρεσίαν, ὅπως
παρ' ἐκείνων τυγχάνοντες τῆς εἰς τὰ ἀνάγκαῖα ἐπιμελείας, αὐτοὶ πάλιν
ἀποδιδῶσιν ἐκείνοις δι' αὐτῶν ἅπερ ἂν ὦσιν ὑπηρετεῖν δυνατοί⁴.†

⁴ Athen. VI.
18.

Ανοητότεροι [Βάρβαροι] καὶ ἥττον τῶν Ελλήνων νοῆσαι δυνάμενοι⁵.‡

⁵ Vlpian. ad
Midianam
Demosth.

Tunc intellectum est, quantum ingenua servilibus ingenia praeferant; malitiaque servos, non sapientia vincere⁶.

⁶ Just. XVIII.
3.

* Illi vero retro

Caedentes hastis tergum atque etiam humeros,
Servitutem inducunt, laboremque sustinendum & calamitatem.

† Posidonius Stoicus undecimo libro historiarum scribit, quosdam, et eos non paucos, quia propter imbellicitatem ac tarditatem mentis jus suum tueri nequirent, prudentioribus se ministros tradidisse, ut iis quae necessario provideri debent, ab illis defensi, vicissim reddant suam ipsi, quam possunt, ministrandi operam.

‡ Hebetiores sunt [Barbari] et minus facile percipiunt quam Graeci.

F f f 2

And

And it must not be forgotten, that though We find in the vulgate
 *Odyss. P. 322. Copies of *Homer**,

Ἡμισυ γάρ τ' ἀρετῆς ἀποαίνυται εὐρύοπα Ζεὺς
 Ἀνέρος, εὖτ' ἂν μιν κατὰ δέλιον ἡμᾶρ ἔλῃσιν,*

† VI. de Rep. there seems to have been another Reading formerly, according to *Plato*†
 ‡ VI. 18. and *Athenaeus*‡,

Ἡμισυ γάρ τε ΝΟΟΤ ΑΠΑΜΕΙΡΕΤΑΙ †——

To these let me add a (IVth) Sort, viz. Such with the Ancients as were reduced to this Condition by no Act or Calamity of their own, but by the Calamity of those that went before them. For, as Antiquity held Slaves as Cattle, so *Si Foetura gregem suppleverit*, the Produce was the Property of those that own'd the Producer, *jure Domini*. This Kind or Sort had a Name of their own, and such a one was emphatically called *Verna*.

Most of the Species of Servitude, which I have here enumerated, have been considered by ancient Writers: whose Passages may possibly throw some Light upon several things which I have observed:

Οὐκ ἐννοῶντες, ὅτι παρὰ μὲν ἀνθρώποις τῇ φύσει δῆλος ὕδεις. ἡ γὰρ καταδυναστευθέντες ὑπὸ ζυγὸν δουλείας ἠνέχθησαν, ὡς ἐν αἰχμαλωσίαις. ἡ δὲ διὰ πεινίαν κατεδωλώθησαν, ὡς οἱ Αἰγύπτιοι τῷ Φαραῶ. ἡ κατὰ τινὰ σοφὴν καὶ ἀπόρρητον οἰκονομίαν οἱ χεῖρες τῶν παιδῶν, ἐκ τῆς τῶν πατέρων φωνῆς, τοῖς φρονιμωτέροις καὶ βελτίοσι δουλεύειν κατεδικάσθησαν. ἢν, ὡδὲ καταδίκην, ἀλλὰ ευεργεσίαν, εἴποι τις ἂν δίκαιος τῶν γινόμενων ἐξεταστής. Τὸν γὰρ, δι' ἐνδειαν τῆ φρονεῖν, ἐκ ἔχοντα ἐν ἑαυτῷ τὸ κατὰ φύσιν ἄρχον, τῆτον ἑτέρου κτῆμα γενέσθαι λυσιτελέσερον, ἵνα τῷ τῆ κρατύντος λογισμῷ διευθυνόμενος, ὁμοῖος ᾖ ἄρματι ἡνίοχον ἀναλαβόντι, καὶ πλοῖῳ κυβερνήτην ἔχοντι ἐπὶ οἰακῶν καθημένον. ‡

* D. Basilus
 de Spirit.
 Sanct. c. 20.

The Doctrine (or the Language at least) of the Stoics is not so distinct, as that of this very venerable Ecclesiastic.

Εἶναι τὴν δουλείαν, σέσησιν αὐτοπραγίας· εἶναι δὲ καὶ ἄλλην δουλείαν τὴν ἐν ὑποτάξει· καὶ τρίτην, τὴν ἐν κλήσει· καὶ ὑποτάξει, ἣ ἀντιτίθεται ἡ δεσποτεία. ||

* Diog. Laert.
 in Zenone,
 §. 122.

* *Dimidium enim virtutis aufert late-sonans Jupiter
 Viro, quando ipsum servilis dies corripuerit.*

† *Dimidium mentis abstulit*——

‡ *Non secum reputantes, apud homines nullum quidem esse natura servum. Aut enim vi debellati sub jugum servitutis missi sunt, quemadmodum usu venit bello captis: aut propter rei familiaris inopiam servi facti sunt, quemadmodum Aegyptii Pharaoni serviebant; aut juxta prudentem quandam et arcanam administrationem, liberorum inferiores, patris monitu, addicebantur in servitutem prudentioribus et melioribus. Quam tamen, non additionem, sive condemnationem, sed beneficium potius, vocaret aequus rerum aestimator. Nam qui ob sensus inopiam non habet in se id quod natura imperat et dominatur, utilius est talem alterius possessionem fieri, ut potentioris prudentia directus, similis sit curru, qui aurigam habeat, aut navi quae nauclerum nactus est clavo assidentem.*

|| *Esse autem Servitutem, privationem Libertatis: esse autem aliam quae subsistit in Subjectione: et tertiam denique in possessione, et subjectione simul, cui opponitur Potestas Dominica.*

If I apprehend it right, the Stoics maintained there were *two* kinds of Servitude, Subjection, or Deprivation of Liberty, (call it which you will) sc. *Dominical* Subjection, and *Civil* Subordination. I am the more confirmed in this Opinion, because I find the Roman Lawyers distinguished so also: *Libertas est naturalis Facultas ejus, quod quique facere libet, nisi siquid vi aut jure prohibetur*². But because the Former admitted of *Majus* and *Minus*, to use the Language of the Schools, viz. was either gentle Servitude, or absolute Slavery, ἡ ἐν κτήσει, where Slaves made a Part of Property, so We come by *Zeno's* threefold Division. There are other Divisions to be seen in *Suidas*³.

Something of the above Four Sorts in their Order.

² v. Δουλεία.
Δούλοι.

I. *Hired* or *Domestic* Servants, which is the true, proper, and natural Contemplation of Servitude, and prevails with us at this Day, is nothing else but a plain Contract, and to be guided by the Rules and Conditions of that Bargain invariably. The Master is bound by the Agreement to pay the Wages, or other Considerations, upon the Terms of the Stipulation: and the Servant is bound on the other hand to Faithfulness and Assiduity. Besides this, there is, upon the very Face of the Relation, a Superiority on the one hand, and a Subordination on the other, and then it will follow from general and well-known Principles, that there is a Respect and a Reverence due from the Person in the Inferior Station to the Person in the Higher. A Master may also compell his Servants to their Duty by any proper Arguments, or Means of Persuasion. And such Methods will be always those that suit with the Nature of the Contract itself. As for instance, He may reasonably with-hold or with-draw his Part of the Stipulation, if they are wanting in fulfilling theirs, or dismiss them and dissolve the Agreement. Correction and Corporal Punishment, which some Writers have allowed, seems not to follow the Institution; nor the Exercise to be agreeable to the Genius and Spirit of the Contract. I can suppose in the Servant an Inferiority, but not such an Inferiority, as includes a Civil Subjection. And the Terms of the Covenant convey to the Master a Right over the Offices of his Servant, but, I think, not over his Person.

The Jews had the Idea and the Practice of this kind of mercenary Servitude.

*If Thy Brother be waxen poor, and sells himself to Thee, Thou shalt not constrain him to serve as a Slave; but He shall be with Thee as an Hired Servant, or a Sojourner, to the Year of Jubilee*⁴.

⁴ Levit. XXV.

Nay, the Greeks themselves perhaps were not unacquainted with it: 39. 49.

Τίνες αὐτῶ

Κῆροι ἔποντ' Ἰθάκης ἐξαιρέτοι; ἢ εἰς αὐτῶ

Θῆτες τε Δμῶες τε;* ⁵

⁵ Homer. Odyss. Δ. 642.

* Quinam illum

Secuti sint Juvenes ex Ithaca selecti; anne cum suis Mercenarii, et Mancipia?

Where

Where the Scholiast distinguishes,

ΘΗΤΕΣ οἱ ἐπὶ μισθῷ δουλεύοντες· ΔΜΟΕΣ οἱ δούλοι, παρὰ τὸ δεδμησθαι,
ὃ ἐστὶν ὑποταχθῆναι.*

The Ministerium of Free Men was not unknown to the Romans also:

*Familiae appellatione omnes, qui in servitio sunt, continentur: etiam liberi homines, qui ei bona fide serviunt, vel alieni*⁶.

* D. 21. 1. 25.
2. Add. 39. 4.
1. 5.

And this inclines me to think, that *Free Men*, and not *Sons*, are to be understood in this Law of the same *Vlpian*, though I know it is generally taken for the latter:

* D. 50. 16. 42.
2.

*Familiae appellatione Liberi quoque continentur*⁷.

For, to explain Law by Law, and *Vlpian* by himself:

*Familiae appellatione et eos quos loco servorum habemus, contineri oportere dicendum est*⁸.

* D. 43. 16. 1.
18.

Again,

*Sed et cum his, quos loco servorum in operis habet, habitabit, licet liberi sint, vel servi alieni*⁹.

* D. 7. 8. 4.

The Term, *Mercenarius*, moreover is not uncommon in the Law Books¹ and the Classics:

* D. 48. 19.
11. 1.
43. 16. 1. 20.

*Etiam, ut jam longius a verbo recedamus, ab aequitate, ne tantulum quidem; si tuus servus nullus fuerit, sed omnes alieni ac mercenarii*².

* Cic. pro
Caecin. 20.
* Id. pro Clu-
ent. 59.

*Est hic Ennius egens quidam, calumniator, mercenarius Oppianici*³.

*Meminerimus autem etiam adversus infimos justitiam esse servandam: Est autem infima conditio et fortuna servorum; quibus, non male praecipiant, qui ita jubent uti, ut mercenariis; operam exigendam, jussu praebenda*⁴.

* Id. I. Offic.
13.

II. But that Servitude had the greatest Attention paid to it by Antiquity, which was founded upon Conquest:

*Servorum appellatio ex eo fluxit, quod Imperatores captivos vendere, ac per hoc servare nec occidere solent*⁵.

* D. 50. 16.
239. 1.

They were also upon this Principle called *Mancipia*, quod ab Hostibus manu capiuntur.

*Cum enim Homo ab Homine superatus jure belli posset occidi, quia servatus est, Servus est appellatus, et Mancipia, quia manu capta sunt*⁶.

* Augustin.
lib. 1. in Ge-
nes. quest.
153.

Not that this is unknown to the Moderns also. A great Part of the Asiatic Servitude is of this Tenor: and the same Principle furnishes us with Negro Slaves for our Western Plantations.

* Θήτες sunt Σέρβοι, qui merces luunt: Δούλοι δούλοι sunt παρὰ τὸ δεδμησθαι, i. e. a dominis, seu subjugantibus, quia eorum erat fortuna.

This Relation was a kind of Compact, but a Tacit one. The Right which the Conqueror acquired was worth more to Him, when he commuted Blood for Service, and would rather avail himself of the Sinews or the Ingenuity of an useful Servant, than choose to be entertained with a justifiable perhaps, but an unnecessary, Cruelty. And on the other hand this Condition (for a Condition it was) was too advantageous to be rejected by the other Party: and thence arose this Relation, and mutual Emolument.

I call it a justifiable Cruelty from the consent and usage of Nations in that particular, from the Idea we commonly entertain of this Dispute, and from the Conditions and the Fate of War. Each Party in the Question is supposed to stake all that he is worth, and the Conqueror has a right to his Winnings, but may, if he pleases, accept of a Composition.

Νέμος ἐν πάσιν ἀνθρώποις αἰδιός ἐστιν, ὅταν πολεμούντων πόλις ἀλῶ, τῶν ἐλόντων εἶναι καὶ τὰ σώματα τῶν ἐν τῇ πόλει, καὶ τὰ χρήματα.*

* Xenoph.
Cyr. Paed. lib.
7. fin.

So Livy³,

Syphax P. R. auspiciis victus captusque est. Itaque ipse, conjux, regnum, ager, oppida, homines, qui incolunt, quicquid denique Syphacis fuit, praeda P. R. est.

³ XXX. 14.

For if by the Law of Nature his Life be at our discretion, we have a fair Right to what is less than that.

Non enim contra Naturam est spoliare eum, quem honestum est occidere².

² Cic. III. Offic. 6.

And if so, the Alternative must be fair and advantageous:

Non id, quod amittitur, in damno, quum omnia victoris sint, sed quicquid relinquitur, pro munere habituri estis¹.

¹ Liv. XXI. 13.

So that it has been well observed:

In Hostibus captis et in servitutem redactis esse observatum quod utile erat et benignum. Eos servari et non occidi, benignitatis esse, servire utilitatis, occidi neutrius.

Vendere cum passis captivum, occidere noli².

² Hor. 1.
Epist. XVI.
69.

I say, that this Right of Dominion over the Persons of others, founded upon Conquest, is thus understood by the Ancients. I represent their way of conceiving it only: I am not to answer for their inaccuracies, if there be any. So in the last Section, when I follow Aristotle from his Family Republic to the Civil, I would not be understood to adopt any notion of the Moderns in the least detrimental to the Rights of Mankind, or the true Idea of Civil Government.

* Lex apud omnes homines est aeterna, ut, cum quis hostium capitur, et captus ab eis servatur, non occidatur.

But

But not to pass by the consideration of the War itself: It must be what we called *Bellum Justum*, a War between two supreme Powers, who have a Right and a Reason to wage it: A War legally undertaken, formally denounced, and regularly maintained.

Wherefore Prisoners taken in a Civil War by either Faction, did not lose their Liberty †.

In Civilibus dissensionibus, quamvis saepe per eas Resp. laedatur, non tamen in exitium Reip. contenditur; qui in alterutras partes discedent, vice hostium non sunt eorum, inter quos Jure Captivitatum aut Postliminiorum fuerunt: et ideo captos, et venundatos, posteaque manumissos, placuit supervacuo repetere a Principe ingenuitatem, quam nulla captivitate amiserant ‡.

‡ D. 49. 15.
21. 1.

(And as a Civil War did not produce Slavery, so neither could it warrant or authorize Plunder. Not that I think the reason given for

‡ II. Offic. 8. it by Tully † sufficient:

Nec non unquam bellorum civilium semen et causa deerit, dum homines perdit hastam illam cruentam et meminerint, et sperabunt, quam P. Sylla cum vibrasset, dictatore propinquo suo, idem sexto et tricesimo anno post a sceleratiore hasta non recessit: alter autem, qui in illa dictatura scriba fuerat, in hac fuit Quaestor urbanus. Ex quo debet intelligi, talibus praemiis propositis, nunquam defutura bella civilia)

Such also was the condition of Prisoners taken by Banditti, by Pirates, etc. who were not included within the Law of Arms.

Hostes sunt, quibus bellum publice P. R. decrevit, vel ipsi Populo Romano: Ceteri latrunculi, vel praedones appellantur. Et ideo, qui a latronibus captus est, servus latronum non est: nec postliminium illi necessarium est. Ab hostibus autem captus, utputa a Germanis et Parthis, et servus est hostium, et postliminio statum pristinum recuperat †.

† D. 49. 15.
24. Add. l.
19. § 2 eod.
D. 50. 16. 118.

For besides the consideration that their Captivity was against Law, and consequently had no legal Effects, it was absurd in itself, that free People should be Slaves to one another:

‡ Vlpian. ad
Midianam.

‡ T. III. Edit.
Cant. p. 104.

Πάλαι γὰρ ἐκ ἐξῆν Ἑλλήνας εἶναι δέλον, ἀλλὰ Βαρβάρους ἐκέχρητο ‡.*

The Text of *Demosthenes* ‡, upon which *Vlpian* wrote that Comment,

runs thus:

Εἰς τὰς Βαρβάρους—παρ' ὧν τὰ ἀνδράποδα εἰς τὰς Ἑλλήνας κομίζεσθαι. †

* Olim enim nefas erat Graecum servire, verum ad eam rem Barbaris utebantur.
† Ad Barbaros, unde Mancipia in Graeciam adducuntur.

So the same Author²,

Υπήκε δὲ ὁ ταύτην τὴν χώραν ἔχων αὐτοῖς Βασιλεὺς, ὥσπερ ἐστὶ προσήκον Paris.
Βάρβαρον Ἑλλησι.†

III. And this leads me to my third Head, or, to consider what the Ancients meant by *natural* Slavery. For many Philosophers have thought that even Captivity itself was no justifiable Reason to introduce this Condition; that this Act of the Conqueror favoured too much of private Interest; and lastly, that the Event of War, which makes no distinction of Persons, was too unsafe a Principle to rest this Right upon, as it might inconsiderately reduce into this Class such, whose Birth and Education, the Dignity of their Condition, or the Lustre of their Endowments seemed by Nature to have entitled them to a more favourable Circumstance of Life.

Aristotle therefore³ thought he saw a Fitness or Moral Convenience, ³ Polit. lib. I. a kind of providential Distribution, in the Parts and Abilities of Mankind. He imagined that Nature intended Command and Empire for those who were formed with Powers and Dispositions for that purpose: and gave to the other half of Mankind a Strength of Body with an Infirmary of Judgment, to *qualify* them for the laudable purposes of Subjection.

A great part of this Nonsensical Doctrine was owing to the Pride of the Greeks, and, after them, the Romans; neither of whom, as I just now observed, could easily reconcile the notion of Slavery with the Dignity of their own Character; and thus were led to imagine, that Nature had poured round them the Barbarian Nations for the goodly Employment of Slaves and Ministers.

Τὸ αὐτὸ φύσει Βάρβαρον καὶ Δῆλον⁴.‡

⁴ Aristot. I Polit. lib. I. init.

And again,

Βάρβαροι τὸ φύσει ἄρχον ἐκ ἔχουσι⁵.||

⁵ Ibid.

In conformity to this is the Advice which that Philosopher gave to *Alexander*, when he went upon his Expedition to Asia:

Ἑλλησιν ἡγεμονικῶς, τοῖς δὲ Βαρβάροις δεσποτικῶς χρᾶσθαι· καὶ τῶν μὲν ὡς φίλων καὶ οἰκείων ἐπιμελεῖσθαι, τοῖς δὲ ὡς ζώοις ἢ φυτοῖς προσφέρεισθαι⁶.§

⁶ Plutarch. de Fortun. Alexandr. Orat. I.

The same Writer also has,

Διό φασιν οἱ Ποιηταί, Βαρβάρων δ' Ἑλλήνας ἄρχειν εἰκός⁷.*

⁷ Aristot. l. c.

† Illis tunc paruit Rex istius regionis, ut fas erat Graecis Barbarum.

‡ Idem est natura Barbarum et Servum.

|| Barbari natura dominans non habent.

§ Graecis uti, ut Ducem et Imperatorem, Barbaris, ut Dominum: et illos curare ut amicos et domesticos, cum his autem versari ut animalibus et plantis.

* Idcirco dicunt Poetae, Barbaris Graecos imperitare fas est.

* Iphigen. in
Aul. 1400.

The Poet he alludes to, is *Euripides*°.

Βαρβάρων δ' Ἑλλήνας ἄρχειν εἰκός, ἀλλ' ἔ Βαρβάρους,
Μῆτερ, Ἑλλήνων· τὸ μὲν γὰρ δῆλον, οἱ δ' ἐλεύθεροι.

They therefore never made Slaves of what I may call *their own Species*: and it was in compliance to the Law of Nations, which comprehended the general System (or rather because they could not well help it) that Captivity and the Chance of War could work this alteration in a Greek or Roman. Whence perhaps arose the Notion of the Roman *Postliminium*, under which They considered a Prisoner of War, upon his return to Rome, never to have been in Bondage at all.

The slavish and absurd Doctrine I was mentioning, and which is this third Idea of Servitude, has been fully considered by the Commentators upon *Aristotle's Politics*, where (in the first Book) this System is laid down at large. Many have condemned it, and some have softened it. There is a very good piece wrote upon this Subject, by *Dan. Heinsius*, which was printed by *Janus Rutgersius* in his *Various Lections*, and in *Christoph. Riccius' Vindiciae Juris Rom*°.

° Otto Thef.
J.R. Tom. II.
pag. 804.

The best thing that has been said in defence of it, is, that the Introduction of Servitude was a very convenient Invention for Men of slow parts and moderate Capacities, and that the lower Class of Mankind very happily exchanged their bodily Offices, for Sustenance and Protection. There was an Expediency in it, say the old Writers, and whatever is expedient, is natural, or *secundum naturam*. According to which principle, some were Slaves by Nature, *i. e.* made or designed by Nature to be so: others *contra Naturam*, such namely as the Impressions of Force, or the Right of Conquest had made so, though naturally born Free, and intended by Nature to be Free°. And thus *Vlpian*° concerning the Services of Estates,

Inferiorem superiori servire — naturaliter.

• Aristot. I.
Polit. 3.
Aristaeus I.
3. 3.

° D. 39 3. 1. 23.

But then this leads to my *First* Position of Mercenary Servitude, not constitutes this *Third* Idea, which *Aristotle* was so fond of. The whole of that System is subverted by one Observation of a very good Modern Writer: *viz.* “That the bare Possession of such and such Qualities, as are proper and fitting for any given State or Condition of Life, do not necessarily imply and convey that State, or Condition.” Let me take an Instance from *Jason*, the Tyrant of Theffaly¹: Him I mean, who said of himself, that he hungered and thirsted after Empire:

¹ Aristot. III.
Polit. 3.

² Shakesp.
Tempest.

*So dry he was for Sway*².

† Convenit enim Graecos Barbaris Imperitare, non autem Barbaros, Mater, Graecis. Illi enim natura servitutem serviunt, hi autem sunt liberi.

Let

Let him : Let his Stomach be ever so keen, or his Digestion ever so good, these Qualities did not immediately convey to him the proper Commons for that purpose. He might have plaid his Part very well, but then he must have had a part to Play : and the Right of coming at that was quite another consideration.

I have another Objection to this Doctrine, upon the Score of the scandalous Misapprehension of Human Nature. That Unity of Condition, which is the Foundation of Natural Law, is as true and as just as ever was advanced. And yet both Greeks and Romans could deny all the World but themselves, the common Rights of Humanity. According to which Persuasion, *Florus* was in the Right to call Slaves *Secundum Genus Hominum*³; and the Woman in *Juvenal*, to dispute even that :

³ III. 20.

*O Demens ! Ita Servus Homo est*⁴ ?

⁴ *Juvenal* VI. 222.

This Passage of *Plato* is worth reciting :

Τόγε τῆς Πόλεως γενναῖον καὶ ἐλεύθερον, βέλαιόν τε καὶ ὑγιὲς ἐστὶ, καὶ ΦΥΣΕΙ ΜΙΣΟΒΑΡΒΑΡΟΝ, διὰ τὸ εἰλικρινῶς εἶναι Ἕλληνας, καὶ ἀμιγεῖς βαρβάρων. ἔ γάρ Πέλοπες, ἔδὲ Κάδμοι, ἔδὲ Αἰγυπτοὶ τε καὶ Δαναοὶ, ἔδὲ ἄλλοι πολλοὶ, φύσει μὲν βάρβαροι ὄντες, νόμῳ δὲ Ἕλληνες, συνοικῶσιν ἡμῖν, ἀλλ' αὐτοὶ Ἕλληνες, ἔ μιζοβάρβαροι, οἰκῶμεν. ΟΘΕΝ ΚΑΘΑΡΟΝ ΤΟ ΜΙΣΟΣ ΕΝΤΕΤΗΚΕ ΤΗΙ ΠΟΛΕΙ ΤΗΣ ΑΛΛΟΤΡΙΑΣ ΦΥΣΕΩΣ⁵.*

⁵ *Plato* in *Menexeno*.

Not to mention a farther Quarrel which I have to this Philosophy : and that is the monstrous and glaring Absurdity of it. For it was not true with *Seneca*⁶, in the first place, that Nature is always attentive to keeping the ballance between Body and Mind with that critical exactness,

⁶ *Epist.* LXXX.

Vt imbecilli essent animo, quorum lacertos humerosque miramur.

Nor is it true, in the next, that the servile Offices were all Manual, and Laborious ; that they all required

Magnos membrorum artus, magna ossa lacertosque.

Many, very many, were called upon, we have no doubt, to exert the Vigor of their Minds and not the Strength of their Sinews. The Ingenuity of Painters, Praeceptors, and Actors ; of those, who were a *Bibliothecis, a Studiis, a Rationibus*, is an instance of my meaning. To range no farther for Examples, than one Family (indeed it was a very considerable one) there was discovered about the Year 1726, in the *Via Appia*, the

* *Civitatis nostrae [Athenarum] granditas atque celsitudo, generosa, libera, constans, integra, et naturae quodam impetu barbarorum inimica, quod a germanis sit genuinisque Graecis, qui sint a barbaris impermixti plane, nihilque cum illis habeant commune. Non enim vel Pelopes, vel Cadmi, vel Aegyptii, vel Danaï, vel alii multi, natura quidem barbari, lege et instituto Graeci, nobiscum habitant, sed nos germani Graeci, non vero Hybridæ, patriam nostram incolimus : unde naturale quoddam odium adversus alienam naturam civitati inolevit.*

burying Place or *Sepulchretum* of the Household of *Augustus Caesar*. *Bi-anchini*, a Veronese, was one, who published a good Account of it, the Year following⁶. And there we find most of these Offices following:

⁶ Camera ed
Inscrizioni
Sepulcrali de
Liberti, Servi,
ed Vfficiali
della Casa di
Augusto,
scoperte nella
Via Appia,
etc. Rom.
1727. Fol.

A BIBLIOTHECA GRAECA PALAT. — A BIBLIOTHECA LATINA
APOLLINIS — SCRIBA AB EPISTOLIS GRAECIS — SCRIBA AB
EPISTOLIS LATINIS — A STATVIS — A TABVLIS — A LIB.
PONTIFICALIBVS — AD IMAGINES — AD POSSESSIONES — AD-
IVTOR TABVLARII A RAT. — AEDITVVS FORTVNAE REDVCIS —
AEDITVVS TEMPLI DIVI AVG. ET DIVAE AVGVSTAE — COMOE-
DVS — DECVRIO CVBICVLARIORVM — SVpra CVBICVLARIOS —
CVSTOS RATIONVM PATRIMONII — DISPENSATOR.

(This last was doubtless that Officer of Consideration in great Families to whom *St. Luke* alludes⁷,

⁷ XII. 42.

Τίς ἄρα ἐστὶν ὁ πιστὸς Οἰκονόμος καὶ ΦΡΟΝΙΜΟΣ, ὃν καταστήσει ὁ Κύριος ἐπὶ τῆς Θεραπείας αὐτοῦ, τῷ δίδοναι ἐν καιρῷ τὸ Σιτομέτριον;*

These kept the Register or Muster-Roll of the Family, and distributed to the Slaves their daily Allowance⁸.)

⁸ D. Lib.
XXXII. Lex
XCIX.
D. 50. 16.
166.

LECTOR LIVIAE — LIBRARIA — MAGISTER SERV. — MEDI-
CVS — MEDICVS DECVRIO — SVpra MEDICOS — MENSOR LIVIAE
— NOMENCLATOR AVG. — NVMLARIVS — ORNATOR — ORNA-
TRIX — PICTOR — POLIT. — PRINCEPS TABELL. — PROC. A
REG. VRBIS — ROGATOR — SACERDOS A BONA DEA DEC. —
TABELLAR. PRINCEPS etc.

Among the above we find the Physician, MEDICVS—SVpra MEDICOS. And indeed it is not to be wondered at. For in that State or Condition I find the Faculty almost perpetually. I would not make that Controversy mine, but, if I have occasion, I think I can defend what I assert, with variety of Proofs: some of which I am satisfied have escaped the many Writers in this Dispute, a Dispute, which first began with *Barn. Brissónius*, and has been kept alive almost from his time to ours, as will appear by the History of it. For this Controversy has furnished out an History, intitled, *Jul. Car. Schlaegeri Historia Litis de Medicorum apud veteres Romanos degentium Conditione*⁹. An Abstract of which may be seen in the Notes of *Alb. Diet. Trekell*, upon *Brissónius's Antiquitates Selectae*¹.

⁹ Helmst.
1740. 4.

¹ II. 3. Edit.
1749. Fol.

Therefore, though there is no difference in the State of Servitude, as I had occasion to observe lately, πάντες τὴν αὐτὴν δαλείαν δαλεύουσιν†, yet in consideration of their Offices and Employments, I can conceive a Distinction.

* Quis autem est fidelis ille et prudens Dispensator, quem constituet Dominus supra Famulitium suum, ad demensum in justo tempore distribuendum?

† Omnes eandem Servitutem serviunt.

between one Slave and another. Thus We observe in the Works of the Ancients, a Subordination between the *Rustici* and *Vrbani*: And, as the Great were possessed of very large Families, which had the Appearance of a little Commonwealth, so a Distribution and Subordination, a Scale of Degrees, where some were made for Honour, and some for Dishonour, as it happens in the great World, seems to be almost as necessary in the One Oeconomy, as in the Other. The Genius of the Slaves admitted, doubtless, of as much Difference, as those of their Masters. Those in the Greek and Roman Comedies, are often very distinct Characters. Nay, They have been so well contrasted upon the Stage, that some Critics have ventured to restore this Passage in *Horace*³, ²A.P.v. 114. in conformity to that Opposition of Character,

Intererit multum, Davusne loquatur, Erosne.

Every one, that looks into Inscriptions, or reads the Digest, will find that *Eros* was a very common Name for a Servant, as well as *Davus*. And this is also, I apprehend, more conformable to the MSS. *Davus* was a crafty Knave, and *Eros*, a plain Servant.

And now that I am considering a Difference between one Slave and another, it may not be improper to speak a Word or two, upon a very considerable One. Some there were with the Ancients of a middle Sort, and had the *Ratio* of Slaves in some respects, and in some, of Masters. *Servi* therefore were

*Vel Ordinarii*³,
*Vel Peculiares*⁴,

³D. 14.4.5.1.
15. 1. 17.
J. 2. 20. 17.
⁴D. 3. 2. 4. 3.
33. 8. 21.

For it followed *prono alveo*, that, if Slaves were considered as Property, and were capable of being possessed, as Goods or Cattle: and again, If the Slave, by a Fiction of Law, or an Indulgence of it, was allowed, like the Son, his *Peculium*, or little Stock, his *Rem familiarem*, a *Rationibus Dominicis distinctam*, That Stock may as well consist of one kind of Cattle, as another; of the Human Slave, as well as the Brutal: and the Proprietor of that *Peculiar* Estate, as far as it extends, be looked upon as *Dominus*. Which Appellation is given him in the Law quoted in my Margin⁵.

⁵D. 15. 1. 17.

Now these subordinate Ministers, these *Servi Servorum*, were called *Peculiares*, *quia scil. erant in Peculio Ordinarii*. They are sometimes also, and indeed more frequently (because the Slaves of Private People were often denominated *Peculiares*, to distinguish them from those of the Public) called *Vicarii*:

⁶D. 33.8.6.3.
⁷l. 4. eod.
Add D. 9. 4.
19. 2.

*Si Servus et Vicarius ejus liberi esse jussi sunt*⁶—

*Set et si cum Vicariis suis legatus sit Servus, durat Vicariorum legatum, et mortuo eo, aut alienato, aut manumisso*⁷.

10. 3. 25.
21. 1. 44.
37. 7. 12. 44.
33. 8. 15 and
Vrbana 16.

Urbana Familia et Rustica, non loco, sed genere distinguitur. Potest enim aliquis Dispensator non esse servorum urbanorum numero, veluti is, qui rusticarum rerum rationes dispenset, ibique habitet, non multum abest a Villico. Insularius autem urbanorum numero est. Videntur tamen est, ipse Dominus quorum loco quemque habuerit: quod ex numero familiae et vicariis apparebit⁸.

⁷ D. 50. 16.
166. pr.

Where however the Reading is disputed, and, I think, with some reason.

In the old Glossaries We find: *Vicarius*, Δέλε δέλος.

*Adde super, dictis quod non levius valeat: nam
Sive Vicarius est, qui Servo paret, uti Mos
Vester ait, seu Conservus⁹.*

⁹ Hor. II.
Serm. VII. 78.

Esse sat est Servum: jam nolo Vicarius esse.

¹ Martial. II.
Epig. 18.

Qui Rex est, Regem, Maxime, non habeat¹.

² Senec. de
Tranquill.
Anim. c. 8.

Cui jamdudum Divitiae esse debuerant, duo Vicarii, et Cella laxior¹.

D. M.

SPORVS. CAES. N. S.
VILIC. AQUAE CLAUDIAE
FECIT SIBI ET CLAUDIAE
HERMIONE CONIVGI
SVAE SANTISSIMAE
ET LIBERTIS LIBERTA
BVSQ. EIVS ET VIKARIS
SVIS POSTERISQ.
EORVM OMNIVM
IN PARTE DIMIDIA SVA³.

³ Reines. IX.
39. and Fa-
brett. p. 301.

DIS MAN.
ASCLEPIADI
ATHICTVS L. N.
A FRUMENTO
VICARIAE CARISSIMAE
BENEMERENTI
FECIT ET SIBI⁴.

⁴ Gruter.
DXCII. 8.

⁵ D. 33. 8. 25.

Nay; We have in one Law of the Digest, *Vicarii Vicariorum⁵*.

⁶ Inscript.
pag. 302. seqq.

Fabretti is well worth consulting upon this Occasion⁶.

We

We have something like the *Servus-in-Peculio*, in very remote Antiquity :

Σῖτον δὲ σφιν ἔνειμε Μεσαύλιος, ὃν ῥα συβώτης
 Αὐτὸς κτήσατο οἶος, ἀποιχομένοιο ἀνακτός,
 Νόσφιν δεσποίνης καὶ Λαέρταο γέροντος,
 Πὰρ δ' ἄρα μιν Ταφίων πρίατο κλεάτεσσον ἐοῖσιν⁷. *

⁷ Odyss. XIV.
 449.

A Passage well worth regarding, as it is a full Instance of the Point, for which I produced it : as it likewise presents us with a fair Example of the *Peculium* in general : and lastly, as it suggests, what We may have occasion to mention hereafter, the Antiquity of Traffic, which was supported *permutando*, non *emendo*⁸. My Reader will observe, that I consider here *Eumaeus* himself as a Slave, though I am not ignorant that some People of late have taken great Pains to make him a Gentleman.

⁸ D. 18. 1. 1.

These Reflexions may perhaps carry me too far from my Design. I return therefore to my

IVth and last Species : which was the Circumstances of the *Vernae*, the *Οἰκογενεῖς* †, or those Slaves that accrue to their Master, *ratione Nativitatis*.

*Jure Gentium Servi nostri sunt, qui ab hostibus capiuntur, aut qui ex ancillis nostris nascuntur*⁹.

⁹ D. 1. 5. 5. 1.
 J. 1. 3. 4.

Which is perfectly consonant to the manner in which the Romans considered their Slaves, viz. as Animals or Cattle¹.

¹ D. 9. 2. 2. 2.
 41. 1. 6.

This Case comprehends two difficulties. 1. How and in what manner the Calamity of the Parent can effect the Liberty of the Offspring? 2. Why the Consideration of the *Mother* only should determine the Fate of her Child? For here, as in all Live-Stock, the Maxim prevails, viz. *Partus sequitur Ventrem*; and the Law is very exprefs :

*Partum Ancillae Matris sequi conditionem, nec statum Patris in hac Specie considerari, explorati Juris est*².

² C. 3. 32. 7.

1. To the first it may be answered (and it often has been) that the Right of the Owner over the Produce of his Slave accrues to him from this Consideration, viz. That by granting the Favour of Life to the Captive, that Favour was imparted to the future Production also, which never had existed, *si Victor Jure suo uti voluisset*. I know, this is sometimes disputed. But no Objection was ever formed against this Reason, which did not lie against the Right of Slavery itself, or the Fate of *original* Captivity.

* Ponem autem ipsis distribuit Mesaulius, quem sc. Subulcus
 Ipse sibi comparaverat solus, absente Domino,
 Secusim a Domina et Laerte sene:
 Ipsum nempe a Taphiis emit possessionibus suis.

† Domi nati.

Again.

Again. The Offspring of a Slave, through its own Impotency, can provide nothing for the State of its Infancy: and from the Disability of its Parents, who are possessed of nothing, can expect as little. Therefore the future Service of its Life is due to the Owner, as a Debt of

¹ Grot. II. 5. Education ².

²⁹.
Pufendorf.
VI. 3. 9.

Moreover, Slaves have no Right to dispose of their own persons, and therefore cannot fairly contract without the Consent of their Owner. And especially, when We consider, that This is such a Contract, as, during a great Part of the Mother's Time, is prejudicial to her Owner, and robs him of her Labour. To this it may be added, that the Purposes of those Conjunctions are not only Production but Education ³; to one of which the Parties in Question are absolutely unequal.

³ Above, pag
289. 365. etc.

I add in the next Place, that the Father, who is in *servili Conditione*, can possibly have no Power over his Child: for allowing the Scheme of Slavery to be not inconsistent as to him, that Maxim is undeniably true, scil. *Nemo potest alium in sua manu habere, qui ipse est in aliena*. And then, as to the Mother, the Maxim will be at least of as much Force against her Power, as it was against that of the Father. Especially, if We con-

⁴ Above, pag
395.

sider, what We have noticed in part before ⁴, that even in a natural Contemplation, the *Jus Maternae Potestatis* was a Thing unheard of, and denied to Women of a Free Condition. Therefore, as this Power must devolve somewhere, it seems naturally to fall, where all have settled it, who have gone into these Considerations, viz. into the Hands of the Proprietor; whose Power is that of a Master, the *Potestas Dominica*, or *Herilis*.

Upon the whole, I can see neither Difficulty nor Absurdity in the Conclusion. If the Principles of Slavery are fair and just in themselves, and it is against no Law whatever, to consider *Homines ut Res*, then all the Rights of Possession will follow the Rights of Slavery. I avail myself of an Acquisition in the Produce of one Animal; as well as another, and, if I am Proprietor of the Soil, I am Proprietor of what is planted there.

⁵ J. 2. 1. 37.

And yet, I know that the Civil Law, which has much strengthened the Doctrine We are accounting for, has with a seemingly great Refinement pronounced *Partum Ancillae in Fructu non esse*⁵. Nay, what is more so, has given *this* as a Reason, why the Master of her Person should be the Master of her Production.

In pecudum fructu etiam foetus est, sicuti Lac, Pilus et Lana: Itaque Agni, Hoedi et Vituli et Equuli et Surculi statim naturali Jure Domini Fructuarii sunt; Partus vero Ancillae in fructu non est, itaque ad Dominum Proprietatis pertinet.

But if this Law be attended to, the Meaning of it will come out fair and natural. The Question here is not the Question We are concerned in: not, whether the Produce of a Female Slave is born a Slave or no: but, supposing the *Ancilla* to be in *Vsufuctu*, whether her Offspring belongs to the *Vsufuctuary*, or the Proprietor? To the Proprietor no doubt, as the

Law

Law here directs, for this plain reason: Because She was not let out to breed. *Non temere Ancillae ejus rei causa comparantur, ut pariant*⁶. ⁶ D. 5 3. 27. It was *praeter naturam et conditionem utendi fruendi*. For the Emolument of the *Vsufuctuary* arises only from that use of the Goods, which the Nature of them warrants, and the Proprietor is supposed to intend. The *Fruit* of the *Ancilla* is her Service, not her Increase.

2. I come now to consider the other Branch of the Difficulty, which was, *Why the Consideration of the Mother only should determine the State of her Child*. For, as that Child may have a *Free Man* to his Father, it seems a very hard and unfavourable Limitation to tie him down to the Servile Condition of his Mother. And there is likewise involved in it another Difficulty: As, supposing the Slave, that begets, is the Property of *Titius*, and the Slave, that bears, the Property of *Sempronius*, *Why should the Produce accrue to Sempronius rather than to Titius?* But one Answer will serve for both.

And indeed, a good Part of that Answer is dispersed up and down in those Considerations, which I bestowed upon the former Question. But, upon the whole, this Rule We are now concerned in, can be accounted for upon no Principles so well, as by examining those of the Roman Law. *Pater est, quem Nuptiae demonstrant*, was a Maxim, the Civilians never lost sight of. The Condition of the Mother must therefore infallibly and invariably mark out the Condition of her Child. For, as She was, during that State, absolutely incapable of *Nuptiae*⁷, it would ⁷ J. 1. 10. pr. be impossible for the Child ever to claim a Father. *Vlpian* indeed founds it upon the Law of Nature:

*Lex Naturae haec est, ut qui nascitur sine legitimo matrimonio matrem sequatur*⁸.

⁸ D. 1. 5. 24.

Where we see the Civil Law, the *Legitimum Matrimonium*, is taken into the Account to make out the Law of Nature by. There is no Impropriety in the Expression, as if He meant that *Natural* Law could be beholden to *Positive*, absolutely and in all Cases. But in the Hypothetical Law of Nature, it must be, as I have considered it. There is an Hypothesis, an Institution, a System (*viz.* here a *legitimum Matrimonium*) first laid down and admitted; and then Nature is consulted, to see what She recommends in such Circumstances⁹.

⁹ Above, pag.

It is undoubtedly true, that Civil Law must be comprehended in this ^{130. 144.} Contemplation. For instance: Where the Father is not known, as in the case of *Vulgo quaesiti*, etc. the Reference must of *Necessity* be made to the Mother, *quia de Patre non constat*.

*Nec enim debuisse caveri, ut vulgo quaesitus Matris conditionem sequeretur. Quam enim aliam originem hic habet*¹?

¹ D. 50. 1. 1. 2.

But in the *Contubernium* of Slaves, where the Father may as regularly be known, as in lawful Wedlock, there is not an *Uncertainty* of the Fa-

H h h

ther's

ther's Person, so much as an *Unwillingness* in the Civil Law to own him. He wants the Form and Solemnity, the *Tabb. Nuptiales*, and other Ceremonies, which *Arbitrary*, not *Natural* Law, make necessary to constitute the Father. And because the same Regard is had *de non apparentibus*, as *de non existentibus*; nay farther, because Law supposes that not to be done at all, which is not done according to her Direction; therefore all born *extra justas Nuptias* are reduced to the Class of those, whose Fathers cannot be made out, and therefore must follow the Mother. But who does not at first sight discover the Difference between a Child, whose Father may possibly be *hid* under an absolute Uncertainty, and another, whose Father is *dissembled* by an Imagination of Law? Let us see a case, where the Civil Law pronounces very highly of an *Uncertainty of her own Creation*.

Imp. ANTONINVS A. Hostiliae.

Si ignorans statum Erotis, ut liberum duxisti, et dotem dedisti, isque postea servus est judicatus; dotem ex peculio recipies: et siquid praeterea eum tibi debuisse apparuerit. Filii autem tui, ut ex libera nati, incerto tamen patre, spurii ingenui intelliguntur¹.

¹ C. 5. 18. 3.

Before I make up my Account of the *Servitus Vterina*, there is one Article in it, which is not to be neglected. It is said, that in some Cases the Calamity of the Mother shall not have an Influence upon the State of her Child. For instance: if She be reduced to Slavery during her Pregnancy, the Child conceived before that Distress shall be Free², and her Captivity shall no more extend to the *ante conceptos*, than it can to the *ante natos*. What then becomes of my Right of Conquest? And what of my Argument, that I saved the Child's Life in saving the Mother's, and thereby became intitled to its services?

² J. 1. 4. pr.
D. 1. 5. 5. 2.
Paul. Sent. V.
1. 2.

But this does not affect the Right of the Conqueror, but leads us to distinguish between a State of Slavery, and a servile Condition; to a Maxim laid down by the Roman Lawyers, *viz. Aliud est Servum esse, aliud servire, or esse in Servitude*. Just as it is one thing *Liberum esse, aliud esse in Libertate*. It is one thing to *Possess*, another to *be in Possession*, as *Ulpian* writes³; and the Difference is much the same with that of *de Facto* and *de Jure*.

³ D. 41. 2. 10. 1.

It is therefore no more than this: If *Sempronia* be taken Prisoner, the Child conceived before that Captivity shall have its *Postliminium*; but those conceived during her Slavery shall not. The One could recover its *Ingenuity*, the Other must accept of *Manumission*.

Si Praegnans Mulier ab hostibus capta sit, id quod enixa erit, postliminium habet⁴.

⁴ D. 1. 5. 26.

The Law extends its Regards, as far as it can, and considers those in *Vtero*, as already born, *quoties de eorum favore agitur*.

Nec mirum fit ex Serva Ingenuum nasci, cum et ex Captiva rescriptum sit Ingenuum nasci⁵.

⁵ D. 38. 16. 1. 1.

There

There is a very good Author, who accounts for this in a very flowenly Manner. But to proceed:

It seems to follow, that as the Condition of these Uterine Slaves was more pityable than that of others, so their Treatment ought to be more favourable; as no Act of their own had reduced them to these unhappy Circumstances; as they had neither voluntarily bartered their Liberty for Hire, nor forfeited their Condition by actual Captivity.

And so We find it. Their Youth, and Innocence, the Consideration of the domestic Relation they had to their Master, being born under his Roof, and bred up under his Hands, pleaded much in Abatement of Dominion. And no wonder therefore, if We sometimes see them great Favourites.

Ego sum Felicio, cui solebas sigillaria afferre, Philofiti villici filius, deliciolum tuum¹.

¹ Senec. Epist. 12.

*Siquis plorator collo tibi Vernula pendet,
Haec quatiat tenera garrula fistra manu².*

² Martial. XIV.

*Vernaculorum dicta, sordidum dentem,
Et faeda linguae probra circulatricis³.*

Epigr. 54.
³ Id. X. 3. 1.

And from this Indulgence arose that Pertness and Petulancy of Manners, which much distinguished this Class of People; which is recorded in the *Vernularum Licentia* of Seneca¹, in the *Vernae Procaces* of Horace²; ¹ de Provid. c. 1. is visible in the well-known use of the Word *Vernilitas*; and happily explains a Passage in Terence, relating to one of this sawcy Fraternity,
² 2 Serm. VI. 66.

Curiales Vernula est, qui me vocat³.

³ Terent. Phorm. V. 6. 10.

We gather something of their Situation from the Style of their Epitaphs, which is generally very magnificent: The following are sufficient Instances:

SECVRITATI
COGNATIONIS SVAE
FORTVNATVS AVG. LIB.
VERNA PATERNVS
AB EPISTVLIS
ACCENSVS PATRON.
DIVO AVG. VESPASIANO
LICTOR CVRIAT.
VIAT. HONOR. DEC. COS. ET PR.
ET SIBI ET
EPAPHRODITO AVG. L.
AB EPISTVLIS FRATRI SVO⁴.

⁴ Gruter. DLXXXVI.

SERVITUDE.

D. M.

IVDIAE. J. LIB.

HELPIDIS

VIX. ANN. XVI. MENS. VIII.

DIES II. IVLIA

IRENA

FECIT VERNAE SVAE

CARISS. BENEMEREN.

ET SIBI SVIS LIBERTIS

LIBERTABVSQ. POSTERISQ.

EORVM ET

FLORO VIRO EIVS

LIBERTIS. LIBERTABQ.

POSTERISQ. EIVS⁵.

⁵ Mazochius.
Boissardus.
Gruter.

CMXLII. 10.

⁶ VI. 29.

To which let me add, that *Glaucia*, a favourite *Verna*, was honoured at his Decease, more than once by *Martial*. One of which Epigrams I here produce⁶:

*Non de plebe domus, nec avarae Verna catastrae,
Sed domini sancto dignus amore puer.
Munera cum posset nondum sentire Patroni,
Glaucia libertus jam Melioris erat.
Moribus hoc Formaeque datum. Quis blandior illo?
Aut quis Apollineo pulchrior ore fuit?
Immodicis brevis est Aetas, et rara Senectus:
Quicquid amas, cupias non placuisse nimis.*

There cannot be a greater Instance than the Case of *Servius Tullius*:

In Servio autem Tullio Fortuna praecipue vires suas ostendit: Vernam huic urbi natum, Regem dando: cui quidem diutissime Imperium obtinere, quater lustrum condere, ter triumphare contigit. Ad summam, aut unde processerit, aut quo pervenerit, statuæ titulus abunde testatur, servili cognomine, et regia appellatione perplexus⁷.

⁷ Valer.
Maxim. III.
4. 3.

Servio Tullio etiam tum puerulo dormienti, circa caput flammam emicuisse, domestici oculi annotaverunt. Quod prodigium Prisci Tarquini Regis Vxor Tanaquil admirata, Servium, serva natum, in modum filii educavit, et ad Regium fastigium evexit⁸.

⁸ Id. I. 6. 1.⁹ III. de Ira

40.

¹ Senec. I. c.
Tertullian. de
Pallio.

Plin. IX. 23.

² I. de Cle-
ment. 18.

I say, this Class of Slaves were thus tenderly considered: but the common Lot of Slaves in general, was with the Ancients, in many Circumstances, very deplorable. The Barbarity of *Vedius Pollo*, which *Seneca* calls *Novitatem Crudelitatis*⁹, is upon Record¹, and brought from that humane Writer this fine Reflection²:

Servis

Servis imperare moderate, laus est: et in Mancipio cogitandum est, non quantum illud impune pati possit, sed quantum Tibi permittat aequibonique natura: quae parcere etiam captivis et pretio paratis jubet. Quanto justius jubet hominibus liberis, ingenuis, honestis, non ut mancipiis abuti, sed his quos gradu antecedas; quorumque Tibi non tradita Servitus sit, sed Tutela? Servis ad statuam licet confugere. Cum in Servum omnia liceant, est aliquid, quod in Hominem licere commune Jus Animantium vetet: quia ejusdem natura est, cujus Tu.

However of their Situation take the following Instances. They were held *pro Nullis*¹, *pro Mortuis*², (How this is to be understood, consult *A. Faber*³) *pro Quadrupedibus*⁴; nay, were in a much worse State, than any Cattle whatsoever, as the same Author has shewn⁵. They had no Head in the State, no Name, Tribe or Register⁶: They were not capable of being injured⁷: Nor could they take by Purchase or Descent⁸: Had no Heirs⁹, and therefore could make no Will of course. Exclusive of what was called their *Peculium*¹⁰, Whatever they acquired, was their Master's¹¹. They could not plead, nor be pleaded, but were excluded from all Civil Concerns whatsoever¹²: Could not claim the Indulgence of Absence *Reip. causa*¹³: Were not intitled to the Rights and Considerations of Matrimony¹⁴, and therefore had no Relief in the case of Adultery¹⁵. Nor were they the proper Objects of Cognation or Affinity, but of *Quasi-Cognatio*¹⁶. They could be sold, transferred, or pawned, as Goods, or Personal Estate; For Goods They were, and such were They esteemed¹⁷. Might be tortured for Evidence¹⁸: Punished at the Discretion of their Lord: Or, even put to Death by his Authority¹⁹; together with many other Civil Incapacities, which I have not room to enumerate.

One Remedy for all these Inconveniences was *MANUMISSION*, or Enfranchisement.

Est autem Manumissio, de manu Missio; id est, datio Libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est: manumissus liberatur potestate. Quae res a Jure Gentium originem sumpsit: utpote, cum jure Naturali omnes liberi nascerentur, nec esset nota Manumissio, cum Servitus esset incognita. Sed posteaquam jure Gentium Servitus invasit, sequutum est beneficium Manumissionis: et cum uno naturali nomine homines appellaremur, jure Gentium tria esse coeperunt, Liberi, et his contrarium Servi, et tertium genus Liberti, id est, hi, qui desierant esse Servi.

Of Manumission, its Ceremony, its Rights and Effects, the Roman Law-Books are very full; but it is of much less Concernment to us, by the Disuse both of Slavery and That. Let it be sufficient to observe briefly two or three Particulars relating to it.

It prevailed for some time, that *Libertus* was the proper Appellation of the Slave that had been manumised, and *Libertinus*, that of his Descendant.

Tem--

⁵ Sueton.
Claud. 24.

⁶ Isidor. VIII.
4.

Temporibus Appii, et deinceps aliquamdiu, Libertinos dictos, non ipsos, qui manumitterentur, sed Ingenuos ex his procreatos⁵.

Libertorum autem filii apud antiquos Libertini appellabantur, quasi de liberis nati⁶.

But afterwards when the Language was perfected, this Distinction was forgotten, and another arose. *Libertus* then became properly a Term of Relation. For the Slave, though manumised, was yet in some degree of Property, and was called such a one's Freed-Man; *Caesaris, Pompeii, vel Ciceronis Libertus*. By which means it came to pass, that *Libertus* was expressive of that Tenure, viz. of the Right of Patronage; and *Libertinus*, in general, of the State or Condition. And the former is frequently in Inscriptions denoted by L. or LIB.

STATIVS
FERENTILIVS STATI L
FIRMVS⁷.

⁷ Fabrett. pag.
27.

Quotiens de hoc contenditur, an quis libertus sit, siue operae petantur, siue obsequium desideretur, siue etiam famosa actio intendatur, siue in jus vocetur, qui se patronum dicit, siue nulla causa interveniat, redditur praejudicium. Sed et quotiens quis libertinum quidem se confitetur, libertum autem Gaii Seii se negat, idem praejudicium datur⁸.

⁸ D. 40. 14. 6.

For it must be noted, that the Yoke was not yet taken off their Shoulders entirely. They still wore their Master's Livery, in carrying his *Nomen* and *Praenomen*, and many other marks of Servility, or, at least, Dependence. Hence the *Jura Patronatus* were many and considerable. There were several Services which the *Liberti* owed, and were bound to make good, as several Titles in the Law-Books shew: the Patron succeeded into half their Estate, if they had no Heirs of their Body, had a Preference in Guardianship, could revoke all fraudulent Alienations, claimed a kind of Homage, and lastly, to mention no more, could punish, what was otherwise unpunishable by most human Constitutions⁹, viz. *Ingratitude*, and recall them to their pristine Condition of Slavery¹.

⁹ Above, pag.
87.

¹ Sueton.
Claud. 25.
D. 37. 14. 5.
Particularly
Goldast. Not.
ad Hadrian.
Imp Rescript.
3 apud Fa-
bric. Bibloth.
Gr. Tom. XII.
pag. 518.

This is doubtless implied in the Words of *Terence*²,

SI. *Scis feci e Servo ut esses libertus mihi:
Propterea quod serviebas liberaliter,
Quod habui summum precium persolvi tibi.*
SO. *In memoria habeo.* SI. HAVD MVTO FACTVM.

To use the Words of *Donatus* upon the Place, *secundum jus, quod adversus libertos ingratos est, ut in servitatem revocentur.*

² Andr. I. 1. 12.

This was a Strain of Discipline, which the Romans owed their great Masters, the *Athenians*.

Age, quid illud institutum Athenarum, quam memorabile: quod convictus a patrono libertus ingratus jure Libertatis exuitur. Supersedeo te, inquit, habere civem tanti muneris impium aestimatorem. Nec adduci possum, et credam Vrbi utilem, quem Domi scelestum cerno. Abi igitur, et esto Servus, quoniam Liber esse nescivisti:

³ Valer. Maxim. II. 6.

Let it be observed again, that all kinds of Manumission anciently did not confer the same degree of Liberty⁴. There was a *Libertas justa* which was conveyed by a formal Manumission, celebrated in all the Rites of the Roman Law; and there was a lower degree of Liberty, *Libertas minus justa*. Among which one was calling your Slave, and making him sit down at Table. I mention this, not because it can merit much Attention (for Manumission being but of little Consideration now, this Difference is of still less, as being very early abolished) but because a tolerable good Writer is of Opinion, that this Rite was alluded to by St. Luke in his Gospel⁵:

⁵ XII. 37.

Blessed are those Servants, whom the Lord, when He cometh, shall find watching: Verily, I say unto You, that He shall gird himself, and make them to sit down to Meat, and will come forth to serve them.

If I was inclined to dispute this Observation, and at the same time was directed to consider any Allusion in this Scripture to a Pagan Custom, I should certainly conclude, that the Allusion was to the Roman *Saturnalia*, rather than this: Where the Servants were entertained, and the Masters waited at Table. When I call this the Roman *Saturnalia*, I am not ignorant of the true Origin of that Rite:

¶ Εν ταῖς τῶν Κρονίων ἡμέραις, ἐν αἷς Ῥωμαίων παισὶν ἔθος ἔστιν ἐσιᾶν τὰς οἰκέτας, αὐτὰς τὰς τῶν οἰκετῶν ἀναδεχομένους λειψυργίας. Ἑλληνικὸν δὲ τὸ τοῦτο ἔθος. ἐν Κρήτῃ γὰρ τῇ τῶν Ερμαίων ἑορτῇ, τὸ ὅμοιον γίνεται, ὡς φησὶ Καρύσιος ἐν ἱστορικοῖς ὑπομνήμασιν. εὐωχεμένων γὰρ τῶν οἰκετῶν οἱ δεσπόται ὑπηρετεῖσι πρὸς τὰς διακονίας. καὶ ἐν Τροίζῃνι δὲ, μηνὶ Γεραισίῳ, πανηγυρίς δὲ τότε γίνεται πολυήμερος, ἥς ἐν μιᾷ οἱ δῆλοι μετὰ τῶν πολιτῶν κοινῇ τε ἀσπραγαλίζουσι, καὶ οἱ κύριοι τὰς δόλους ἐσιῶσιν, ὡς αὐτὸς φησὶ Καρύσιος. Βήρσος δ' ἐν πρώτῳ Βαβυλωνιακῶν τῷ Λάῳ φησὶ μηνὶ ἐκκαιδεκάτῃ ἀγεσθαι ἑορτήν, Σακεαν προσαγορευομένην, ἐν Βαβυλῶνι, ἐπὶ ἡμέρας πέντε, ἐν αἷς ἔθος εἶναι ἀρχεσθαι τὰς δεσπότας ὑπὸ τῶν οἰκετῶν, ἀφη-

¶ Per Saturnales dies, quibus servos Romani convivio solent excipere, servilia ministeria ipsi obeuntes: a Graecis more sumpto. Quoniam idem Mercurii festis diebus in Creta fit, ut scribit Carystius in historicis commentariis, epulantur servorum mensis ministrantibus ac famulantibus dominis. Idem fit et apud Troezenios mense Gerastione, quo per multos dies contentus aguntur, et nundinae. Eorum certo die, servi cum civibus talis publice ludunt, et convivium domini servis exhibent, ut Carystius idem tradit. Berofus libro primo Babyloniorum scripsit, mensis Loi-

ἀφηγείσθαι δὲ τῆς οἰκίας ἓνα αὐτῶν ἐνδεδυκότα σολὴν ὁμοίαν τῇ βασιλικῇ⁷.

⁷ Athen. XIV.
10.

⁸ Dig. Lib. XL.
Tit. IV. DE
MANUMISSIS
TESTAMEN-
TO.

⁹ J. Lib. I. Tit.
VI.

¹ Ibid. Tit.
VII.

² Sucton. Aug.
§ 40.

³ D. 38. 2. 4.

⁴ See Paganin.
Gaudent. I.
Jurid. Expos.
35. apud Ot-
ton. Thef. J. C.
Tom. III.

⁵ Cujac. III.
Observ. 23.

⁶ D. 26. 4. 3.

3.

⁷ D. 40. 8. 5.

⁸ Tom. V. E-
dit. Bryan.
pag. 83.

⁹ § 35.

¹ Apolog.

OF Manumissions none was so common as the Testamentary⁸. In which the Testator would sometimes be so unreasonably profuse, as to defraud his Creditors, or prejudice his Family. This was therefore a proper Object for Restraining Statutes, and such We meet with. Of which the *Lex Aelia Sentia*⁹ and *Fufia Caninia*¹ are Instances².

It followed from the nature of all *post-Mortem-Manumissions*, that, tho' the Slave became by that Act, a Freed Man, however he became *no body's Freed Man*:

*Si necem Domini detexerit Servus, Praetor statuere solet, ut liber sit. Et constat eum quasi ex SCto libertatem consecutum nullius esse libertum*³.

I say, no body's Freed Man in particular, tho' He was often call'd the Freed Man of the Family. However the popular use of Language found out a Patron for him, and such *Liberti* were distinguished by the name of *Charonitae* or *Orcini*⁴, *tanquam Charontis Liberti*⁵.

Plane, si forte ex Rubriano SCto pervenerit ad libertatem, non habebit tutorem eum, qui rogatus est, sed Orcinus Libertus effectus, ad familiam testatoris pertinebit.

*Qui ob necem detectam Domini, praemium libertatis consequitur, fit Orcinus Libertus*⁷.

This is alluded to in *Plutarch's* Life of *M. Antony*, who promoted many, and restored to blood, according to the directions He pretended to have found in the Memorandum-Book of *Julius*:

Διὸ τέτρες ἅπαντας ἐπισκώπωντες οἱ Ῥωμαῖοι Χαρωνίτας ἐκάλεον. ἐλεγχόμενοι γὰρ εἰς τὰς τῆ νεκρῆ κατέφευγον ὑπομνηματισμῶς⁸.*

The same is mentioned by *Suetonius* in his Life of *Augustus*⁹.

There is a Reference to this Humour (I have reason to think) in a passage of *Apuleius*¹. The Accuser, it seems, had got the nick-name of *Charon*, as We are informed, *ob oris et animi diritatem*. Our Author here adds another reason, and that was his good luck at *Successions*:

Neq; enim diu est, cum te crebrae mortes propinquorum immeritis hereditatibus fulserunt. Inde tibi potius, quam ob istam teterrimam faciem, Charon nomen est.

IT IS not to be imagined that the Ancient Slavery continued throughout with that Severity and Rigor, which We have seen attending it, and never

decimo sexto die per quinque dies Babilone festum celebrari, Sacean nominant, cujus tempore mancipia dominis imperant, et ex servis unus quidam praeest aedibus, vestem indutus regiae similem.

* Vnde omnes hos P. R. per ludibrium Charonitas appellabat, quandoquidem, ubi arguebantur, ad mortui confugiebant commentarios.

knew

knew abatement. My Reader therefore will not be displeased to see the Process of this Relaxation.

There is a narrative in *Suidas*², which is pretty remarkable :

² V. PAIOS.

Δελοκρατίαν νομοθετήσας [Caligula] ἐπέτρεψε κατηγορεῖν τῶν δεσποτῶν, εἴτι ἂν αὐτῶν εἶδεῖεν πλημμέλημα. Κἀντεῦθεν δεινὴ συμφορὰ κατελήφει τὴν οἰκυμένην πᾶσαν, τῶν οἰκετῶν μεγάλας τιμορίας; ὑπεβαλλόντων τὰς δεσπότας. ἕκαστος γὰρ ἀμύνεσθαι ἐβέλετο τὸν ἴδιον δεσπότην, ὑπὲρ ᾧ παρ' αὐτῇ βασιάνων προέπασχεν.*

How *Suidas* came by this Anecdote, I know not. It was certainly a bad Stroke of Politics, if it is a true Relation; a Wantonness of Power¹, ¹ D. 1. 12. like many of *Caligula's* Measures, and, according to the Fate which al-² ways attends the Projects of weak and capricious Governors, What must have died with him, if not before him. For no more is heard of it. There is a Passage in *Suetonius*³ of a directly contrary Tendency: Where ³ Calig § 16. reciting the laudable Instances of *Caligula's* Conduct, He says,

Quoque magis nullius non boni exempli fautor videretur, mulieri libertinae octoginta donavit, quod excruciatu gravissimis tormentis de scelere patroni reticuisset.

But This indeed proves nothing: For the most distinguishing Feature in *Caligula's* Character, was his Inconsistency with himself, as *Dion Cassius* has made it plainly appear⁴.

⁴ LIX. 4.

Omitting therefore this dark Account of *Suidas*: The first favourable Law which seems to have been enacted in regard to Slavery, was the *Lex Cornelia de Sicariis*, which had *Sylla* the Dictator for its Author. *Marcian* expounding that Law writes thus⁵:

⁵ D. 48. 8. 1. 2.

Et qui hominem occiderit, punitur, non habita differentia, cujus conditionis hominem interemit.

But this did not tie up, as far as We can gather, the hands of the Master or Proprietor: It concerned a Stranger only, one who had nothing to do with the Slave; against whom the Master had an Action for Damages by the *Aquilian* Law, and another now for Murder by This:

Si dolo Servus occisus sit, et lege Cornelia agere Dominum posse constat: et, si lege Aquilia egerit, praejudicium fieri Corneliae non debet.

⁷ D. 9. 2. 23. 9.

The *Jus Vitae et Necis*, which the Roman Constitution gave to Masters over their Slaves, was first restrained, as far as We can judge, by *Claudius*, the Successor of *Caligula*⁸.

⁸ Sueton. Claud. § 25.

* Servis etiam lege lata eam potestatem et licentiam dedit, ut ipsis dominos accusare liceret, si quod crimen vel peccatum ab iis admissum esse scirent. Haec autem res innumeris malis orbem opplevit, cum servi acerbis suppliciis dominos subjicerent. Vnusquisque enim illorum domino vicem rependere cupiebat pro cruciatibus, quos ante ab illo perpassus fuerat.

Cum quidam aegra et affecta Mancipia in Insulam Aesculapii taedio medendi exponerent, omnes qui exponerentur, liberos esse sanxit, nec redire in ditionem domini, si convaluissent: quod si quis necare mallet quem, quam exponere, caedis crimine teneri.

Under the Reign of his Successor A. V. C. 813. the *Petronian Law* was enacted, which took away a very scandalous Power from the Master, of which the Law here quoted will inform you; and (pretty much like what we have lately seen in the case of the Father's Power⁷) removed the Cognizance from the Domestic to the Civil Judicatory.

⁷ Above, pag. 405.

Post Legem Petroniam, et SCta ad eam Legem pertinentia, Dominis Potestas ablata est ad Bestias depugnandas suo arbitrio servos tradendi; oblato tamen judici servo, si justa sit Domini querela, sic poenae tradetur⁸.

⁸ D. 48. 8. 11. 2.

⁹ III. de Benefic. 22.

¹ D. 1. 6. 2. fn. Add Spartian. in Hadriano, and Pariat. Tit. III.

² 1. 8. 2.

This possibly is alluded to by *Seneca*⁹.

Afterwards the Emperor *Hadrian* discountenanced all severe and injurious Treatment, by banishing *Umbria*, a Woman of Fashion, for five Years, *quod ex levissimis causis ancillas atrocissime tractasset*¹.

Antoninus Pius, his Successor, seems to me, from the Words of the *Institutes*², to have brought home the *Lex Cornelia* to the Person of the Master or Proprietor, when *Justinian* says,

Ex Constitutione Divi Antonini, qui sine causa servum suum occiderit, non minus puniri jubetur, quam si alienum servum occiderit.

The Constitution, or Rescript of the same *Antoninus* to *Marcian*, the Proconsul of *Baetica*, is well known. Here it follows from the Laws last cited, both of *Digest* and *Institutes*:

Dominorum quidem potestatem in suos servos illibatam esse oportet, nec cuiquam hominum jus suum detrahi: sed dominorum interest, ne auxilium contra saevitiam, vel famem, vel intolerabilem injuriam denegetur his qui juste deprecantur. Ideo cognosce de querelis eorum, qui ex familia Julii Sabini ad statuam confugerunt: et, si vel durius habitos, quam aequum est, vel infami injuria affectos cognoveris, veni-ri jube, ita ut in potestatem Domini non revertantur. Qui, si meae Constitutioni fraudem fecerit, sciet me admissum severius exsequiturum.

³ D. 1. 12. § 8.

Something also was done by *Severus*³.

Last of all, *Constantine* ordained, that if a Master should chance to kill his Slave in the course of his Correction, He should not be comprehended in the *Lex Cornelia de Sicariis*: However if the Correction amounted to Torture or Barbarity, and Death should ensue, this Constitution should not be binding. It is entitled *DE EMENDATIONE SERVORVM*⁴, and is very well worth consulting, with what *Gothofred* has collected upon it.

⁴ C. lib IX. Tit. XIV. Lex vnnica.

Christianity greatly discountenanced the Practice, not by any direct Precept, but by bringing us better acquainted with Human Nature, and explaining

explaining to us the Level and Equality of our Condition. And about the XIIth or XIIIth Century, when Ecclesiastical Legislation was at its height, is dated the utter Extinction of Slavery in Europe. It has been observed, that St. Paul's frequent Preachings upon this Topic were sometimes misunderstood: So that, when He told his Followers, that in the Scheme of the Gospel there was neither Bond nor Free, that *τὸ Πνεῦμα Κυρίου, ἐκεῖ ἐλευθερία* * (with many more such Passages) several of his Hearers improved upon so comfortable a Doctrine, and gave him some pains to reduce them, and correct their Mis-apprehensions. The same Opinion prevails with many at this day, who maintain that Slavery and Christianity are inconsistent, and that Baptism into the Christian Church shall work the Effects of Manumission. But surely St. Paul did not reason so, when, after having converted a fugitive Slave, and sent him back to his Master, He became bound for his future good Services, *τόν ποτε σοι ἄρχησον, νυνὶ δὲ σοὶ καὶ ἐμοὶ* ΕΤΧΡΗΤΟΝ †; al-^o Philem ver. 11. luding doubtless to his name, *Onesimus*, a common name with Slaves:

D. M.
ONESIMO
SERVO
FIDELI⁷.

ONESIMVS STATI
RVFI SER. FECIT
SIBI ET SYNTYCHE
CONSERVAE⁸.

DIS MANIB.
L. SERVILIVS ONESIM.
FECIT CONTVBER
SVAE RVNTIAE CALLITYC⁹.

The Instances of this name in *Gruter* are infinite. Of the same sort is CHRESIMVS (very frequent also) ONESIPHORVS, and lastly we meet with VTILIS:

TI. CLAVDIO
VTILI
CLAVDIA ATALANTE
CONIVGI BENE
MERENTI¹.

But upon the whole, Christianity taxes not the Fact with injustice, but exerts the Principles of Humanity and Tendernefs: In likemanner as the Prince, when he extends his Pardon to a Criminal, does not by that im-

* *Vbi est Spiritus Domini, ibi est Libertas.*

† *Olim tibi inutilem, nunc vero et Tibi et Mihi utilem.*

⁷ Gor. Inscript.
Antiq. Flor.
pag. 96.

⁸ Gruter.
CMLXXXVII.
8.

⁹ Fabrett. pag.
315.

¹ Gruter.
DCCLXXII. 5.

peach the Sentence pronounced by his Officer. I shall produce a lively Image of what I am maintaining. It was the Custom in *Old Rome*, that when a Vestal Virgin, or the *Flamen Dialis*, met in the Street, by Accident, with a Malefactor leading to Execution, the Honour due to those Characters, and the Sense of their Function should work a Pardon⁸. This Custom it is said still prevails in *Modern Rome* also; the *Flamen* only, by an easy Transition, changed for the *Cardinal*⁹. Now This is always understood as a Grace or Indulgence only; something admitted *contemplatione Personae*; an Acknowledgment of the Holiness of the Character; in short a Compliment, rather than a Right. Just so is the Article We are engaged in, a Reverence paid to the Gospel Institution, and not a Declaration of any Rule or Conclusion which Christianity has adjudged upon the Right: not a Prohibition against Slavery, founded upon the Principles of that Doctrine. Otherwise it could be no Question, which yet is frequently debated by Civilians, viz. *Whether the Slavery of Antiquity would not be restored with greater Propriety, than it was abolished?*

I know a good Writer who accounts for the Discontinuance of Slavery in Europe upon other Principles, or at least joins other Principles to that which I have mentioned. About the Eleventh Century, When the large Tract of Italy came to be shared by several Masters, when many little Republics were formed, and many inconsiderable States set up a Sovereignty of their own; it was impossible for Proprietors of Slaves to keep them in any tolerable Order of Duty. The Fugitive had not far to run, and He was sure of Protection, wherever He applied himself. Now all this was constantly prevented in former Times, when this Independancy of neighbouring Countries was less considerable, and when many Laws were in being, and those very briskly enforced, for the Recovery of those, that were weary of their Condition.

Another Occasion at this Juncture was not wanting, and here it follows. The Romans never made Soldiers of their Slaves¹: The Honour of the Profession was one Reason, but the Secret was, they durst not trust them with Arms; their Number was so considerable. Which is now also the steady Politics of our West-India Colonies, and for the same Reason. Indeed the Multitude of these Domestics in the early Ages was astonishing, and next to incredible. In the CXth Olympiad, at a Review made by *Demetrius Phalereus*, there were found, at Athens, One and Twenty Thousand Citizens, when the Amount of Slaves was Forty Myriads, or 400,000 Persons². We are told also of 470,000 Slaves in *Argina*, an Island of a very small Extent³. But This is nothing to the Romans: *Pudentilla* the Wife of *Apuleius*⁴, parted with 400 Slaves out of her Substance, when She made over a *Parcel* of her Estate to the Children She had by a former Husband. In the Reign of *Augustus*, a single Person, *C. Caecilius Claudius* left behind him a Family of Slaves in number MMMMCXVI⁵, though He had suffered much in his Domestics, during the

⁸ Gell. X. 15. Plutarch. in Numa. pag. 144. Et in Quaest. Rom. 109.

⁹ Cujac. and others, ad C. 1. 4. 6.

¹ D. 49. 16. 8. and 11.

² Athen. VI. 20.

³ Ibid.

⁴ Apul. Apolog. pag. 111. Edit. Casaub.

⁵ Plin. XXXIII. 10.

the Civil Wars. More surprizing still is the Account in *Athenæus*⁶, that ⁶ l. c. several private People in Rome had Slaves to the Number of Ten, or Twenty Thousand, of their own, and some a greater Number still; and, to obviate an Objection he was aware of, He subjoins, that they were not Stock in Trade, but retained for State and Luxury. So that *Seneca* had good reason for saying⁷:

⁷ de Clem. 24.

In Senatu dicta est aliquando Sententia, ut Servos a Liberis cultus distingueret, deinde apparuit, quantum periculi immineret, si servi nostri numerare nos coepissent.

It was therefore necessary, as I was observing, that the Roman Levies should be composed of those the Government could trust. The Policy of *Augustus* in this particular is worth remarking:

*Libertino milite, præterquam Romæ incendiorum causa, et, si tumultus in graviore annona metueretur, bis usus est: Semel ad præsidium Coloniæ Illyricum contingentium: iterum ad tutelam ripæ Rhæni fluminis, eosque Servos adhuc viris feminisque pecuniosioribus indictos, ac sine mora manumissos, sub priore vexillo habuit, neque aut commissos cum Ingenuis, aut eodem modo armatos*⁸.

⁸ Sueton. §

25.

They never employed them therefore in their Troops, without a previous Manumission, except once after the defeat at *Cannæ* (to the number of 8000⁹) when they were distressed for time. I shall produce ⁹ Liv. XXII. the Story from *Servius*, together with the Text of his Author: 57.

Vix unus Helenor,

*Et Lycus elapsi: quorum primaevus Helenor,
Mæonio Regi quem Serva Licymnia furtim
Sustulerat, vetitisque ad Trojam miserat armis,
Ense Levis nudo, parmaque inglorius alba*¹.

¹ Aen. IX.

VETITIS] *Lege militari intelligimus, quia Servi a Militia prohibebantur: unde et in Deiotariana purgat hoc Cicero, cum fuisset objectum, inter Equites, quos Deiotarus miserat Caesari, unum Servum fuisse: et ait, "Nescio quem ex eo numero servum judicatum: non arbitror, non audiui; sed in eo, etiamsi accidisset, culpam regis nullo modo esse arbitrari." Virgilium autem novimus trahere aliqua de Historia. Servos namque nunquam militasse constat, nisi servitute deposita; excepto Hannibalis tempore, cum post Cannense proelium in tanta necessitate fuit Urbs Roma, ut ne liberandorum quidem servorum daretur Facultas*².

² Serv. ad loc.

But now at the Aera I was concerned with, the Multitude of little States, which sprang up from one great one, occasioned infinite Bickerings, and Matter for Contention. There was not a State or Seignory, which did not want *all* the Hands they could muster in their Confines, either to defend their own Right, or dispute their Neighbours. Thus every Man

was

was taken into the Service: Whom they armed, they must trust: And there could be no Trust but in Free Men, as *Seneca* writes: *Totidem esse Hostes quot Servos*. Thus the Barrier between the Two Natures⁴ was thrown down, and Slavery was heard of no more, in the West.

³ Epist. 47.

⁴ Above, pag. 419.

And yet there came down almost to our Times a Subordination of Mankind: a *Potestas Dominica* without its Fangs; to be heard of in the sundry Appellations of *Homines Proprii*, *Aldii*, *Aldiones*, *Homines Talliabiles*, *Gens de main morte*, *Lassi*, *Servi Massarii*, *Nativi*, *Hinds*, etc.

My Reader must not expect, that I am entering upon the Subject of *Vassalage*, which is quite another thing. The Homage done to a Court of a Manor or Lordship, for the Interest which the Homager enjoys in a Beneficiary Concern, is a distinct Consideration from the Personal Service which a Hind (or the Slave of the Moderns) owed his Lord, and his Master.

It was frequent in the Times I am concerned in, for the Sovereigns of States, to be possessed of very considerable Demesnes; the Emoluments of which were in great Part conveyed to their Courtiers and Dependants, in consideration of some Service, Acknowledgment or Quit-Rent. As the Sovereign had his Followers, those of inferior Rank had theirs also in a proper Subordination. This therefore was the proper *Vassalage*, viz. an Attachment or Dependance upon Sovereigns, or Men of Rank, either in Expectation, or in Consequence, of an Interest formed out of their respective Estates. This Hold or Tenure was a Service, but a Liberal One: and to which People of good Fashion would sometimes submit for the sake of the Emolument. But This is not the Service I am concerned in.

When the Lombards, Franks, and other Northern Powers overspread the Face of Europe, They had their Slaves under those Denominations, which I mentioned above; but of a less servile Condition. They had indeed for a long time the Property of their Persons, and could transfer them, like the Greeks or Romans, (though not out of the King's Dominions, as appears by the Laws of *William the Conqueror*⁵) but had not the *extremum Jus*, that of Life and Death, and were restrained moreover from all rigorous and inhumane Treatment. The Romans, We observed, had their *Familiam Urbanam*, and *Familiam Rusticam*: And, though it is not to be questioned, but these Nations had them also in both Shapes, yet of the Former We find but little Remains; because the chief use They made of their Slaves, was the Cultivation of their Estates: and their manual Labor in Country Employments. In this Condition We commonly find them; *Villains* mostly, in the Sense of the ancient *Villici*, and these generally *Regardant to the Manor*, as the English Law styles them, *i. e.* Fixed, as it were, to the Freehold, Passing along with the Estate; sometimes as useful and valuable Appendages, sometimes as Loads and Incum-

⁵ Wilkins' Legg. Saxon. § 95.

Incumbrances. I say the Period I fixed for the Abolition of Slavery, does by no means extend to these: because upon the Registers of many Churches, Abbies, and Conventual Bodies, We find, of very low date, the Manumissions of their *Coloni* or Husbandmen.

For Ecclesiastical Bodies were at that time very frequent; and as they were very rich, They also had their *Coloni*, their VILLAINS, to cultivate those Farms which the Convent held in their own hands, *ad Mensam Dominicam*, or other Purposes of the Society: And, in Affectation of the State of Princes, They had their VASSALS or Dependants also, which served to increase the Dignity, and swell the Retinue of the Convent, upon public Occasions, to maintain the Interest of the House, and to administer their Secular Concerns. These chief Owners therefore, the Abbot and his College, were distinguished by the respectful Title of *Seniores*: whence it is imagined, that Lordships, or little Sovereignities, in most Languages of Europe, have borrowed their Denomination:

*At that Time,
Through all the Seignorys it was the first,
And Prospero the prime Duke⁶.*

⁶ Shakefp.
Tempest.

Be that as it may: These Peasants of the Church call to mind the *ἱεροδουλοι* of the Ancients. For the Heathen Deities (or their Priests for them) could hold People in Slavery, and enfranchise or manumise them at Pleasure:

So Tully⁷,

⁷ Divin. in Q.
Caecil. § 17.

Agonis est quaedam Lilybaetana, Liberta Veneris Erycinae.

So Strabo⁸,

⁸ VIII. p. m.
378.

Τό τε τῆς Αφροδίτης ἱερὸν ἔτω πλέσιον ὑπῆρξεν, ὥςτε πλείους ἢ χιλιάς ἱεροδούλους ἐκέκτητο ἑταίρας, ἃς ἀνέτιθεσαν τῇ θεῷ καὶ ἄνδρες καὶ γυναῖκες.*.

I shall not enter into a particular Disquisition of the Nature of this Tenure: Graevius upon the Passage of Tully is fit to be consulted⁹. It is sufficient in general to observe, that they were People possessed of Land, which was subject to some Services, or some way connected with the Endowments of the Temple. Such are not unknown at this Day in Roman-Catholic Countries: Where Land-Owners enter themselves upon the *Matricula* of some Convent; by which means their Estates become of Ecclesiastical Tenure, and are consequently discharged of some Secular Incumbrances.

⁹ Add. Misc.
cell. Observ.
Crit. Nov.
Tom. III. pag.
155.

Let me add two or three miscellaneous Reflections, relative to the Article of Slavery, and I take my Leave of the Subject:

* *Templum enim Veneris adeo dives erat, ut ancillas meritorias supra mille haberet Deae consecratas a multis Viris ac Feminis.*

I.

Servitude was very early in Fashion : The Ecclesiastics date it from Times near the Flood :

^o August. XIX.
de C. D. 15.

Nusquam scripturarum legimus Servum, antequam hoc vocabulo Noe justus peccatum filii vindicaret ?

¹ Ambros. de
Jejun.

Manebat, antequam vinum inveniretur, omnibus inconcussa libertas : nemo sciebat a consorte Naturae suae obsequia servitutis exigere. Non esset hodie Servitus, si Ebrietas non fuisset ¹.

The Date is natural enough. When the World began to be peopled, and War brought on the sad Effects of Captivity : when *Nimrads* arose, *Nimrod*,

A mighty Hunter, and his Chace was Man,

this Distinction of Mankind came to be better known. So it fared in Greece. New Bodies of Men continually pouring in upon the Country, in search of Settlements, it was likely They should avail themselves of the former helpless Occupiers, and seize upon their Persons, as well as their Lands. And afterwards, when they found the use of others in administering to their Wants, they extended the Trade, and imported new ones from abroad. This is the History given by *Theopompus* ²:

² Athen. VI.
18.

Λακεδαιμόνιοι μὲν γὰρ καὶ Θετταλοὶ φανήσονται καλὰσκευασάμενοι τὴν δουλείαν ἐκ τῶν Ἑλλήνων τῶν οἰκιστῶν πρότερον τὴν χώραν, ἣν ἐκεῖνοι νῦν ἔχουσιν, οἱ μὲν Ἀχαιῶν, Θετταλοὶ δὲ Περγαιῶν καὶ Μαγνητῶν. Καὶ προσηγόρευσαν τὰς ταλαδωθέας, οἱ μὲν Εἰλωτας, οἱ δὲ Πενέσας. Χῆοι δὲ βαρβάρους κέκτηνται τὰς οἰκίας, καὶ τιμὴν αὐτῶν καταβάλλοντες.*

³ VII. 56.

And this accounts for the Assertion of *Pliny* ¹, where in his History of Inventors He has,

Servitium invenere Lacedaemonii.

II.

⁴ Apostolius.
Suidas, etc.

There is a Proverb Δύλων Πόλις ⁴†, which is variously render'd and understood.

(1). Some are willing to interpret it of a Thing absurd or impracticable : like our Expression, A ROPE OF SAND. Slavery and Citizenship are of all Things the most incompatible. To compose therefore a State of none but those, who were not able to go into the Composition, seems to be the Absurdity pointed at by the Proverb.

* *Lacedaemonii atque Thessali servitia Graeca instituerunt, incolas prius ejus regionis, quam nunc tenent, Lacedaemonii quidem Achivos, Thessali vero Perrhaebos atque Magnesios ; eosque nuncuparunt in servitutem redactos, Eilotas Lacedaemonii, Thessali Penestas. Chii vero barbaros Servos possident numerata praesentique pecunia mercati.*

† *Servorum Civitas.*

(2). Others again imagine it had a Reference to a Non-Entity: a Proverb directed, not to that which *could not* exist, as the last, but to what *never did* exist. It speaks a Sense, which I took some little Pains about at the Head of this Section, when I considered, that no one Set of People were Slaves by Nature; that every Man is born in a State of Freedom and natural Equality, but that *Time and Chance happen to all*:

According to the Words of *Anaxandrides*,

* Athen. VI.
18.

Οὐκ ἔστι ΔΟΥΛΩΝ, ὧγαθ', ἔδαμ' ΠΟΛΙΣ.
Τύχη δὲ πάντα μεταφέρει τὰ σώματα.
Πολλοὶ δὲ νῦν μὲν εἰσιν ἐκ ἐλεύθεροι,
Εἰς ταῦριον δὲ Συνιεῖς· εἴτ' εἰς τρίτην,
Αγορᾷ κέχρηται. Τὸν γὰρ οἶακα σρέφει
Δαίμων ἑκάστω.*

And yet One would be apt to imagine, that the Ancients were sometimes of a quite different Opinion:

Φίλιππος ὁ Θεαγγελεὺς ἐν τῷ περὶ Καρῶν καὶ Λελέγων συγγράμματι, κατα-
λέξας τὰς Λακεδαιμονίων Εἰλωτας, καὶ τὰς Θετταλικὰς Πενέσας, καὶ Κᾶρας
φησὶ τοῖς Λέλεξι ὡς οἰκέταις χρήσασθαι πάλαι τε καὶ νῦν. Φύλαρχος δ'
ἐν ἑκτῇ ἱστορίῳ καὶ Βυζαντίῳ φησὶν ἔτι Βιθυνῶν δεσπότης, ὡς Λακεδαι-
μονίους τῶν Εἰλωτων†.

* Athen. VI.
20.

It is natural for neighbouring Nations, and not well disposed to Terms of Friendship, to look upon one another in this Light. So the common Proverb runs with us, *That the French are sorry Masters, but good Servants*. As *Agefilaus* said many Ages ago of the Asiatics, and *Callicratidas* of the Ionians. Thus it fared between the Lacedaemonians and Messenians: whence the Proverb, *Δυλότερος Μεσσηνίων* ‡. And It may be worth remarking, that no body disputes the Term [*Slave*] to be borrowed of a whole Nation [*the Sclavonians*].

* *Nulla usquam est, bone vir, servorum civitas:*
Transfert enim Fortuna omnium corpora.
Nunc quidem multi sunt nondum liberi:
Cras autem Suniensas: tertio post die, foro
idem utuntur: clavum autem vertit
Cuique Deus.

† *Philippus Theangelensis in opere de Caribus et Lelegibus, posteaquam recensuit Lacedaemonio-
rum Eileas, Thessalorum Penestas, Caras tradit Lelegibus nunc uti, olimque usos fuisse pro
servis. Phylarchus libro sexta historiarum tradit, Byzantios ita dominos fuisse Bithynorum, quem-
admodum Eilotum Lacedaemonios.*

‡ *Serviliter Messeniis.*

K k k

(3). The

⁷ Apostol. VII. 37. (3). The third Sense given to this, is what my Reader will find in the *Paroemiographi*⁷, whose Words I here transcribe :

Δύλων πόλεις] Εν Λιβύῃ. Εφορος ἔ. καὶ ἑτέρα ἱεροδόταν, ἐν ᾗ εἰς ἐλεύθερος ἔσιν. Εἰς δὲ καὶ ἐν Κρήτῃ Δελόπολις, ὡς Σασικράτης ἐν τῇ αὐτῶν Κρητικῶν. Εἰς δὲ τις περὶ Θράκην Πονηρόπολις, ἣν Φίλιππον φασὶ συνοικίσαι, τὰς ἐπὶ πονηρίας διαβαλλομένους αὐτόθι συναγαγόντα, συκοφάντας, καὶ ψευδομάρτυρας, καὶ τὰς συνηγόρους, καὶ τὰς ἄλλας πονηροὺς, ὡς δισχίλις, ὡς Θεόπομπος ἐν τῇ τῶν Φιλιππικῶν φησι.*

The former Part of this Quotation is something like a Story related by ⁸ Justin⁸, in regard to the People of *Tyre*, where the Slaves expelled their Masters, and were for taking up the Reins of Government ; till the superior Genius of *one* Free Man, who had the good Fortune to be reserved, made them sensible of the Difference. The Project of *Philip* in the last Part, recorded by *Theopompus*, I confess I do not comprehend. It was a very strange Settlement sure. But *Philip* had a Cast of Politics of his own. I cannot dismiss this Subject, without recommending to my Readers a Passage in *Steph. Byzantinus*⁹, very proper to be compared with this.

⁹ v. ΔΟΥΔΩΝ ΠΟΛΙΣ.

III.

Not only private People had their Slaves, but Cities, Colleges, or Fraternities.

Of the public Servants of the State, the Οἰκέται δημόσιοι, or simply Δημόσιοι¹, there can be no Doubt. Such were the *Accensi*, *Lictores*, etc. among the Romans. Thus

¹ Not. ad Lyfiam. pag. 47^o. Fabrett. pag. 336.

TI. CLAUDIVS
MVNICIPI CELEIAE
LIB. FAVOR. PRO SE ET
IVLIA PVSILLA
VOTVM SOLVIT².

² Gruter. CXV. 5.

*Servus Municipum, vel Collegii, vel Decuriae Heres institutus, manumissus vel alienatus, adibit hereditatem*³.

³ D. 29. 2. 25.

¹.

⁴ Above, pag. 421.

⁵ Heinecc. Antiqq. Rom. l. 3. 8.

These, as I observed lately⁴, were sometimes opposed to *Peculiares*, i. e. *Privati*, and were in a better Condition, than the Slaves of private Families⁵.

It has been well remarked by a very good Critic and Antiquary, that when Colleges and incorporated Societies manumised their Slaves, those *Liberti*, like the *Liberti* of private People, were generally denominated

* *Servorum urbs*] In Libya, ut Ephorus scribit lib. 5^{to}. Et alia sacrorum servorum, in qua unus liber est. In Creta etiam est Dulopolis, ut scribit Sosicrates in primo libro de Rebus Cretenfibus. Est et alia quaedam juxta Thraciam Poneropolis, i. e. Improborum Civitas, quam Philippum condidisse ferunt ; qui eo omnes flagitiis maculatos collocavit, sycophantas, falsos testes, eorumque defensores, et alios id genus facinorosos, ad duo millia, quemadmodum Theopompus ait libro 13^{to} Rerum Philippicarum.

from

from their Patrons. Thus, in regard to the united *Company* of the *Fabri* and *Centonarii*:

FABRICIAE
CENTONIAE
ARETHVSAE VXORI
OPTIMAE ET CHRESIMAE
FILIAE CARISSIM.
FABRICIVS CENTONIVS
COLLEGIORVM LIB.
CHRESIMVS⁶.

⁶ Fabret. pag.
434.

IV.

As Colleges had their Slaves, so sometimes, in spite of the Proverb⁷,
Slaves had their COLLEGES. ⁷ Above, pag.
440.

IMP. CAESARI DIVI TRAIANI
PARTHICI. F. DIVI NERVAE NEPOTI
TRAIANO. HADRIANO. AVG. PONTIFICI
MAXIMO TRIB. POTEST. XIII. COS. III. P. P.
COLLEG. VICTIMARIOR. QVI IPSI ET SACERDOTIBVS ET
MAGISTR. ET SENATVI APPARENT QVOD CVM COMMODIS EORVM
INPVGNARETVR LIBERALITATE EIVS RESTITVTA SINT DEDIC. VI K. MAIAS
Q. FABIO CATVLLINO. M. FLAVIO APRO COS⁸.

⁸ Fabrett. pag.

And it is worth noting, that *FAMILIA* is often to be understood in
this Sense; viz. for the whole Groupe, or System of Slaves belonging
to one Owner. And indeed many have shewn that this is the true,
original, and precise use of *Familia*, scil. *pro Coetu, Populo* (if I may
be allowed the Expression) *Servorum*. ^{451.}

*Servitutium quoque solemus appellare Familias, ut in Edicto Praetoris
ostendimus sub titulo De Furtis, ubi Praetor loquitur de Familia
Publicanorum*⁹.

⁹ D. 50. 16.
195. 3.

And thus are many Inscriptions to be understood:

LIBERTIS ET FAMILIAE — FAMILIAE ET LIBERT.

A Troop, or Band of *Gladiators* particularly, was frequently intended
by this Expression alone:

*Dedit cuipiam — negotium, qui sine suspicione emeret eam familiam
a Catone — tabulam proscripsit, Se familiam Catonianam vendi-
turum*¹.

¹ Cic. II. ad
Quint. Fr. 6.

V.

As to the NAMES of the Slaves, great was the Difference between the
early Ages, and the more improved. When Human Life was, as *Juvenal*
represents it²,

² XIV. Sat.
168.

Vnus
Vernula, Tres Domini,

K k k 2

That

That Slave wanted no Denomination, for he wanted no Description. When *Marcus* and *Lucius* had each of them a Foot-boy, *Marcus*' was *Marcipor*, and *Lucius*' *Lucipor*.

A Puero composita Publipor, Publiporis: Marcipor, Marciporis. Sic Probus. Ita enim Antiqui pro Publii puer, et Marci puer dicebant ⁹.

⁹ Priscian. l. 6. col. 700.

In Servis jam intercidit illud Genus, quod ducebatur a Domino: unde Marcipores, Publiporesque ¹.

¹ Quintilian. l.

4.

But when Luxury swelled the Slaves of one Family into Regiments, a new Employment was introduced, and work cut out for a *Nomenclator*,

Hoc proficere Mancipiorum Legiones, et in domo Turba externa, ac Servorum quoque causa Nomenclator habendus ².

² Plin. XXXIII. 1.

The general Turn of the Appellation given to the Slave, was in Allusion to the Country He came from. So we meet with *Davus*, *Geta*, *Syrus* in the Comedies: And *Strabo* is of that Perswasion.

Δάκκς — Δαύκς καλεῖσθαι τοπαλαιόν· ἀφ' ἧ καὶ παρὰ τοῖς Ἀττικοῖς ἐπεπόλασε τὰ τῶν δικετῶν ὀνόματα, Γέται καὶ Δαύοι ³.*

³ Lib. VII. p. m. 303.

And a little below:

Εξ ὧν ἐκομίζετο, ἢ τοῖς ἔθνεσιν ἐκείνοις ὁμωνύμως ἐκάλεον τὰς οἰκέτας, ὡς Λυδὸν καὶ Σύρον, ἢ τοῖς ἐπιπολάζουσιν ἐκεῖ ὀνόμασι προσηγόρευον, ὡς Μάνην ἢ Μίδαν, τὸν Φρύγα, Τίβιον δὲ, τὸν Παφλαγόνα.†

Upon the Subject of *Nomina Servilia* many Authors may be consulted: I shall recommend some of them in my Margin ⁴.

⁴ Canter. V. Var. Lect. 4. Gothofred. ad C. 7. 16. 9. Otto Praef. Thef. J. R. Tom. I.

Pignorius pag. 43. 68. 72. Edit. Amst. 1674.

⁵ Cyripaed. lib. 1. passim.

⁶ Athen. VI. 18.

I am persuaded that the Favourite Servant of *Astyages*, (of whom We read so much in *Xenophon* ⁵) Σάκας, was of this Complexion. For I not only find a Nation of that Name, but even *that* national Appellation of a Slave: As in the *Agrestes* of *Pherecrates* ⁶:

Οὐ γὰρ ἦν τότε ἔτε Μάνης, ἔτε Σάκης ἔδει
Δέλος ἀλλ' αὐτὰς ἔδει μοχθεῖν ἅπαντα τὰν τῇ οἰκίᾳ.
Εἶτα πρὸς τέτοιον ἦλυν ὀρθρῆαι τὰς σιτία,
Ὡς τὴν κώμην ὑπηρεῖν θιγγανέων τὰς μύλας.†

* *Dacos* — antiquitus *Davos* appellatos: unde etiam apud Atticos in usu fuerunt *Servorum nomina*, *Getae* et *Davi*.

† *Servis* [*Athenienses*] nomina imponebant, aut *Gentis*, unde fuerant allati, ut *Lydum*, *Syrum*, aut ea, quae apud istas gentes essent usitatissima, ut *Manem* vel *Midam*, qui ex *Phrygia*, *Tibium*, qui ex *Paphlagonia*.

‡ Neque enim tunc aut *Manes* aut *Sacas* ulli erat *Servus*: verum ipsas [*feminas*] oportuit elaborare omnia domi: Porro autem necesse erat illis molere fruges diluculo, Ita ut pagus resonaret strepitu molarum quas versabant.

The

The *Sacae* were a People of Thrace, who gave their name to their Invention, viz. the *Scutum*, or the *Σάκος* of the Greeks, as *Didymus* informs us⁷. They are mentioned in this Passage of *Cratinus* :

⁷ ad Iliad. E.
126.

Κρατῖνος ἐν Σεριφίοις πόλιν δέλων φησιν
Εἶτα Σάκας ἄφικνῇ καὶ Σιδονίης, καὶ Ερεμβῆς,
Ες τε πόλιν [δέλων] ἀνδρῶν νεοπλατοπονήρων⁸.*

⁸ Steph. Byzant. v. ΔΟΥ-
ΔΩΝ ΠΟΔΙΣ.

Pliny makes them *Scythians*.

*Ultra sunt Scytharum Populi. Persae illos Sacas in universum ap-
pellavere, a proxima Gente*⁹.

⁹ Plin. VI. 17.

They are enumerated at the Head of the *Cyripaedia* of *Xenophon*, among the Nations that were subject to *Cyrus*.

It must not be forgot, that some are fond of having them the original *SAXONS*, our great Ancestors. I have reason to believe, that the *Saxons*, *Danes*, *Goths*, etc. were better known to very remote Antiquity, than is commonly apprehended. Some People imagine They find mention made of our Island in *Herodotus*: Which I think very easy to be supported. But these are Reflections, which would carry me and my Reader too far out of our Way.

VI.

Let me add, that Slaves had their peculiar DEITIES. The Patron of this Set of Men was *Hercules*. *Herodotus* tells us¹, there was in *Aegypt* a Temple of *Hercules*, where Slaves found a Sanctuary.

Ἦν δὲ ἐπὶ τῆς ἡϊόνος, ὃ καὶ νῦν ἐστὶν Ἡρακλῆος ἱερόν. ἐς τὸ ἦν καταφυγὼν οἰκέ-
της ὅτεω ἀνθρώπων ἐπιβάληται ζήγματα ἱερά, ἐωϋτὸν διδὼς τῷ θεῷ, ἐκ
ἐξέσι τέττε ἀψασθαι. ὁ νόμος ἔτος διατελεῖ ἐὼν ὁμοίως μέχρις ἐμεῦ τῷ
ἀπαρχῆς.†

HERCVLI AVG.
SACRVM
OFFICINATORES
ET NVMMVLARI
OFFICINARVM
ARGENTARIARVM
FAMILIAE.
MONETARI².

² Gruters.
XLV. 3.

* *Cratinus* in *Seriphiis* urbem *Servorum* vocat
Deinde *Sacas* pervenis et *Sidonios*, et *Erembos*,
Inque urbem [*Servorum*] recens-divitum-scleratorum.

† *Erat* in eo litore templum *Herculis*, quod nunc quoque est: ad quod, si quis cujuscunque ho-
minis *Servus* confugiens inuri sibi curet sacras notas, sese Deo tradens, eum nefas est tangere. Quae
Sanctio ab initio ad meam usque aetatem similiter non mutata perseveravit.

Under a fine Figure of *Hercules* in the *Horti Carpensēs*, is the following short Inscription :

HERCVLI PLACIDO
IABOLENVS AVG. LIB. D. D.

* ad Virg.
VIII. Æn.
564.

*Servius*⁴ informs us, *Feroniam fuisse Libertorum Deam, in cujus templo raso capite pileum accipiebant.* And that there was found in her Temple at *Terracina*, a Stone Chair with this Legend :

BENEMERITI SERVI
SEDEANT
SVRGENT LIBERI.

We all know the Application of the *PILEVS*, the *ANNVLVS*, the *CATHEDRA*, *etc.* in the Creation of Doctors at the University, which carries in its Process a great Resemblance to the ancient Rites of Manumission. I have more than once observed in the course of these Papers, that many Customs and Formularies are not so very *novel*, as We are commonly disposed to hold them.

VII.

Lastly, I observe a FESTIVAL peculiar to Slaves. I do not mean the *Saturnalia*, but another.

Διὰ τί ταῖς Αὐγέσαις εἰδοῖς, Σεκσιλίαις δὲ πρότερον λεγομέναις, ἑορτάζουσιν αἵ τε δούλοι καὶ οἱ δούλοι πάντες ; — ἡ δὲ διὰ τὸν Σερέϊον τὸν βασιλέα κατὰ ταύτην τὴν ἡμέραν ἐξ αἰχμαλώτε γενέσθαι Θερραπαινίδος, ἅδειαν ἔργων ἔχουσιν οἱ Θερραποντες ; *

⁵ Plutarch.
Quæst. Rom.
98.

Or perhaps, for another reason :

*Servorum Dies Festus vulgo existimatur Idib. Augusti, quod eo die Ser. Tullius, natus serva, aedem Dianæ dedicaverit in Aventino*⁶.

⁶ Festus.

⁷ Epist. 47.

I am not sure, that this is alluded to by *Seneca*⁷.

Ne illud quidem videtis, quam omnem invidiam majores nostri Dominis, omnem contumeliam servis detraxerint ? Dominum, patremfam, appellaverunt : Servos, quod etiam in mimis adhuc durat, familiares. Instituerunt diem Festum, quo non solum [it is proper to observe, that Lipsius from MSS. reads, non quo solo] cum servis Domini viderentur, sed quo utique honores illis in domo gerere, jus dicere permiserunt, et domum pusillam Remp. esse judicarunt.

I know that *Lipsius*, who deserves so well of *Seneca*, understands this of the *Saturnalia*. As to the Jurisdiction indulged to Servants, which is mentioned in this passage, I do not think it is confirmed by *Plutarch* in his Life of the elder *Cato*⁸, as it has been imagined. For I am satisfied,

⁸ T. II. p. 356.
Ed. Bryan.

* Cur Idibus Sextil. qui nunc Augustus dicitur, Ferie sunt utriusque sexus servis ? — An hoc Servis datum, ut ociarentur, quod ea die Servius Rex natus e captiva fuit ancilla ?

that

that this Author refers to the domestic Politics of *Cato*, and not to any public Institution. As any one will see from the Text of *Plutarch*, which for the Singularity of *Cato's* Oeconomy is worth transcribing in part :

Εδὲι ἡ πρᾶξις τὶ τῶν ἀναγκαίων οἶκοι τὸν δῶλον ἢ καθεύδειν — αἰεὶ
 δὲ τινὰ γαστρίᾳ ἔχειν τὰς δόλους ἐμμηχανᾶτο, καὶ διαφορὰν πρὸς ἀλλήλους,
 ὑπονοῶν τὴν ὁμόνοιαν αὐτῶν, καὶ δεδοικώς τὰς δ' ἀξίον εἰργασθᾶί τι θανάτου
 δόξαντας, ΕΔΙΚΑΙΟΥΤ ΚΡΙΘΕΝΤΑΣ ΕΝ ΤΟΙΣ ΟΙΚΕΤΑΙΣ ΠΑΣΙΝ
 ΑΠΟΘΝΗΣΚΕΙΝ ΕΙ ΚΑΤΑΓΝΩΣΘΕΙΕΝ.*

I shall suggest only, that the Romans held a *Festum Stultorum* as well as *Festum Servorum*, which is mentioned by *Ovid*, *Plutarch*, and others: and thereby be enabled to conclude this seventh Observation, as I did my last, with the Parallelism of Ancient Customs and Modern. *Du Tilliot*, in a Dissertation published at *Lausanne* 1741, has shewn, that a Festival of this nature is not unknown to the Ritual of the Church of Rome: I need not add, that such a Holyday is yet extant in the VVLGAR KALENDAR of this Nation.

* *Servum aut facere aliquid domi necessarium compellebat, aut dormire — Dissidium perpetuo inter servos et distractionem struebat; concordiam eorum suspectam habens et timens. Qui capitalem fraudem admisisse videbantur, de iis, si in judicio capitis damnati fuissent, supplicium fumebat.*

PROPERTY.

THE great and very Interesting Subject of Property is the last Head of my Observations, wherein I purpose to consider its Origin, Nature and Principle, and then attend to some Rules of the Alienation, or Conveyance of it: Of which though there are many Sorts, I shall confine myself to what is comprehended under those two great Articles, the one of Bargain and Sale, the other of Last Will and Testament.

To give into the primæval System of the World, according to the Conception which the early Writers entertained of it, though there may be something true in their general Apprehension, it gives us but an uncomfortable View of their Situation.

*Cum prorepserunt primis Animalia Terris,
Mutum et turpe pecus, glandem atque cubilia propter
Vnguibus et pugnis, dein fustibus, atque ita porro
Pugnabant armis, quæ post fabricaverat usus:
Donec verba, quibus voces sensusque notarent,
Nominaque invenere; dehinc absistere bello,
Oppida coeperunt munire, et ponere leges¹.*

¹ Hor. 1.
Serm. III. 99.

Nam fuit quoddam tempus, cum in agris Homines passim bestiarum more vagabantur, et sibi victu ferino vitam propagabant; nec ratione animi quidquam, sed pleraque viribus corporis administrabant².

² Cic. I. de
Invent. 2.

Quis vestrum, Judices, ignorat, ita Naturam Rerum tulisse, ut quoddam tempore Homines nondum neque Naturali neque Civili Jure descripto, fusi per agros et dispersi vagarentur, tantumque haberent, quantum manu ac viribus per caedem ac vulnere aut eripere aut retinere potuissent? Qui igitur primi virtute et consilio præstanti exstiterunt, hi perspecto genere humanæ docilitatis atque ingenii, dissipatos unum in locum congregarunt, eosque ex feritate illa ad justitiam atque mansuetudinem transduxerunt. Tum res ad communem utilitatem, quas Publicas appellamus: tum Conventicula hominum, quæ postea Civitates nominatae sunt: tum domicilia conjuncta, quas Vrbes dicimus, invento et divino et humano jure moenibus sepserunt: atque inter hanc vitam perpolitam humanitate, et illam immanem nihil tam interest quam Jus atque Vis³.

³ Cic. pro P.
Sextio. § 42.

Thus much however is certain that there was a great Simplicity in the early Ages of Mankind; that the Terms of *Meum et Tuum* were not understood; that no Man could call any thing his own, and therefore had

no

no Right to enclose it, or separate it from the use and enjoyment of Others :

*Ante Jovem nulli subigebant arva Coloni :
Nec signare quidem, aut partiri limite campum
Fas erat : in medium quaerebant : ipsaque Tellus
Omnia liberius nullo poscente ferebat* ⁴.

⁴ Virg. I.
Georg. 125.

*Communemque prius, ceu lumina Solis et auras,
Cautus humum longo signavit limite Mensor* ⁵.

⁵ Ovid. I. Met.
135.

*Non Domus ulla fores habuit, non fixus in agris,
Qui regeret certis finibus arva, lapis* ⁶.

⁶ Tibull. I. 3.
43.

Which brings to my Mind that fine Passage in Seneca ⁷, where the Condition of these times is elegantly described :

⁷ Hippolyt.
Act. II. ver.
167.

*Hoc equidem reor
Vixisse ritu, prima quos mistos Deis
Profudit Aetas. Nullus his auri fuit
Caecus Cupido : nullus in campo sacer
Divisit agros arbiter populis lapis.
Nondum secabant credulae pontum rates :
Sua quisque norat maria : non vasto aggere,
Crebraque turre cinxerant urbes latus.
Non arma saeva miles aptabat manu :
Nec torta clusas fregerat saxo gravi
Balista portas : jussa nec dominum pati
Functo ferebat terra servitium bove :
Sed arva per se foeta poscentes nihil
Pavere gentes : Sylva nativas opes
Et opaca dederant Antra nativas domos.*

But this is surely what may be called *The other Side of the Question*.

What I have been saying, will supply me with an Observation, or two : One of which may be of use to a Reader of *Homer*.

I. It may be asked on what Propriety is that Expression grounded, which We constantly find in that Writer ?

— εἰδὲ τι θυμὸς ἐδεύετο ΔΑΙΤΟΣ ΕΙΣΗΣ ⁸.
Χαῖρ', Ἀχιλεῦ, ΔΑΙΤΟΣ μὴν ΕΙΣΗΣ ἐκ ἐπιτεύεις ⁹.
Ἀλλὰ σύ γ' ἄρχε θεοῖσι δόμοις ἐνὶ ΔΑΙΤΟΣ ΕΙΣΗΣ ¹.
— ΔΑΙΤΟΣ κεκορήμεθα θυμὸν ΕΙΣΗΣ ².||

⁸ Iliad. A.
468. et 602.

⁹ I. 225.

¹ O. 95.

² Od. O. 98.

* — neque in ulla re aequalis epuli animus penuriam habebat.

† Salve, Achilles, epuli aequalis non es indigus.

§ Sed tu praefis inter deos in aedibus convivio aequali.

|| — convivio explevimus animum aequali.

The Translators would do well to be consistent with themselves. It is shameful to find the same Person rendring it sometimes *aequalis*, sometimes *sufficientis*. But this by the bye.

This perpetual Epithet, according to my Guides, *Eustathius*, and *Athenaeus*, was the Token of Property. It was the Custom of all Mankind formerly, and of Barbarians for a long Continuance, say *Laertius*³ and *Jamblichus*⁴, to eat in common, upon an undivided Mefs, *πρὸς ἓνα ἄρτον*. I do not immediately conclude with the ancient Writers, that this State was therefore naturally and unavoidably a Scene of Debate; that it was like what One of my Authors above quoted, calls

Μισθοφόρον ἀρπαξιδίων σκηπή στρατιωτῶν.*

However it is from hence they argue, in order to account for the Phraseology of *Homer*, that when People saw the Inconvenience of the Practice,⁵ *Athen. l. 10.* δένεμον ἐκάσῳ ἱσθν, καὶ ἔτις εἰς κοσμον ἦλθε τοῖς ἀνθρώποις τὰ δόρπα.**
Thus *Δαῖς* itself ἐπὶ τῷ δαῖσθαι † adds my Author⁶. Thus of the MSS. of *Homer*⁷, Some read,

⁷ Odyss. H. 188. Νῦν μὲν ΔΑΙΣΑΜΕΝΟΙ κατακείετε,

Others again,

Νῦν μὲν ΔΑΙΝΤΜΕΝΟΙ,

And both *Scholium* and Translation fits each Reading indifferently. Thus ⁸ ad Odyss. A. 141. Δαιτρός, ὁ διανέμων τὰ κρέα † as *Didymus* has it⁸; ἐπεὶ ἴσθιν ἐκάσῳ μοῖραν ἐδίδα §, as *Athenaeus*⁹. And lastly, from the old Practice We came by the Word *Ατασθαλία*, if all is true, that They have been saying :

⁹ Id. ibid. Οτι ἐν ταῖς θαλίαις τὰ πρῶτα ἐξήμαρτον οἱ ἄνθρωποι εἰς ἀλλήλους'.||

But above all, it is a standing Proof against an Alteration of the Text of *Homer*⁷, which *Zenodotus* admitted into his Edition. I shall give it ¹⁰ Athen. ibid. in the Words of my Author¹⁰ :

Επὶ μόνων ἀνθρώπων δαΐτας λέγει ὁ Ποιητής, ἐπὶ δὲ θηρίων καὶ ἔτι. ἀγνοῶν δὲ ταύτης τῆς φωνῆς τὴν δύναμιν ὁ Ζηνόδοτος ἐν τῇ κατ' αὐτὸν ἐκδόσει γράφει,

αὐτὰς δὲ ἐλώρια τεύχε κύνεσσιν,

Οἰωνοῖσι τε ΔΑΙΤΑ.

τὴν τῶν γυπῶν καὶ τῶν ἄλλων οἰωνῶν τροφὴν ἔτω καλῶν, μόνε ἀνθρώπου χωρεῦντος τὸ ἴσον ἐκ τῆς προαιρέτικῆς βίας. §§

* Militis haec nummo condueli scena rapacis.

** Unicuique aequalent partem dividerunt, atque ita ad decentem statum pervenere hominibus Coenae. † Δαῖς Convivium a Dividendo, ‡ Δαίσις, qui dividit carnes.

§ Quoniam a-qualem partem unicuique distribuit.

|| Quoniam in Epulis primum se ipsos homines lacedebant.

§§ In hominum tantum victu, non autem ferarum, Δαΐτας Homerus intellexit. Hujus autem dictionis vim Zenodotus non perspiciebat in Editione sua hos versus Homeri sic descripsit, ipsos objecit canibus laniandos,

Atque avibus EPVLAS,

Vulturum et reliquarum avium cibum sic appellans, cum in solum hominem consilio et delectu liberae voluntatis addit acquabilitas.

II. The View I have given of the Old World from the System and Doctrines of some of the Ancients, will let us into some Discoveries; and among the rest, into the true Sense of the following Inscriptions :

LEGIFERAE CE-
RERI D.⁴

⁴ Reines. I. 37.

S
D. CERERI BELSIANAE
ALMAE FRVGIFERAE
ARISTIGERAE THESMO-
PHORAE
CHILEANDER BELSIA-
NVS BELSIAQ. OPS
D. M. D. 7.
D. D. ⁵

⁵ Murator.
XXX. 3.

ΚΟΜΙΝΙΑΙ ΠΛΟΥΤΟΓΕΝΕΙΑΣ ΙΕΡΕΙΑΣ ΔΗΜΗΤΡΟΣ ΘΕΣΜΟΦΟΡΟΥ
ΘΥΓΑΤΡΙ ΓΥΝΑΙΚΙ ΠΑΚΚΙΟΥ ΚΑΛΗΔΟΥ ΑΡΧΟΝΤΙΚΟΥ ΚΑΙ ΜΗΤΡΙ
ΠΑΚΚΙΟΥ ΚΑΛΗΔΙΑΝΟΥ ΑΓΟΡΑΝΟΜΙΚΟΥ ΜΑΜΜΗ ΚΑΣΤΡΙΚΙΟΥ
ΠΟΛΛΙΩΝΟΣ ΑΡΧΟΝΤΙΚΟΥ ΤΙΕΙ ΚΑΣΤΡΙΚΙΟΣ ΚΑΛΗΔΙΑΝΟΣ ΔΗ-
ΜΑΡΧΗΣΑΣ ΤΗ ΠΡΟΜΑΜΜΗ ΕΥΣΕΒΕΙΑΣ ΕΝΕΚΑ
ΔΟΓΜΑΤΙ ΣΥΓΚΛΗΤΟΥ ⁶.

⁶ Reines V. 9.

Η ΣΥΝΟΔΟΣ ΤΩΝ ΜΥΣΤΩΝ ΤΗΣ ΜΕΓΑΛΗΣ
ΘΕΑΣ ΘΕΣΜΟΦΟΡΟΥ ΔΗΜΗΤΡΟΣ ΜΗΤΡΟΔΩΡΟΝ
ΕΡΜΟΓΕΝΟΥΣ ΤΟΥ ΜΗΤΡΟΔΩΡΟΥ ΜΑΤΡΩΝ
ΣΥΜΜΑΡΤΥΡΑΣ ΤΟΝ ΣΤΕΦΑΝΗΦΟΡΟΝ ⁷.

⁷ Gruter.
CCCIX. 1.

To conceive this aright, let us but imagine it probable, that all the great Improvements of Life were struck off nearly at a Heat. The Acknowledgements which the Ancients paid to *Ceres* and *Bacchus* (or however to those Persons, whom *Ceres* and *Bacchus* represented) to Those,

Who gave them Corn for Mast, for Water Wine ⁸:

⁸ Dryden's
Translat of
Virg. I.
Georg. 8.

were well intended, if those Inventions had stopt even there. But Refinement shewed the Way to Refinement. For whilst Mankind was contented with the Simplicity of their original Diet, it was indifferent which Oak shed the Acorn, and which Rock distilled the Beverage. The World was all before them. And there was as little of Choice, as there was of Elegance, in the Entertainment. But see how considerably the Case was altered, upon the Invention of Agriculture⁹! There was not a Man, who planted a Vineyard, but like the *Householder* in the Parable, He hedged it round about¹. And in like manner, when the Husbandman had spent his strength in manuring, and tilling the Ground, and in the Sweat of his Face had prepared his Bread²; it became needful to enclose and to distinguish it, that Others might not reap, where He had sown.

⁹ Diodor. Sic.
I. 14.

¹ Matth. XXI.

² Gen. III. 19.

There is a very pretty Epigram of *Antipater's*, not extant, I think, in the *Anthologia*, but often printed of late, which relates to that Period of Time, when the World dined, without taking great Pains in the Apparatus: And though it may not contribute much to my Argument, may well enough suit the Occasion:

Ισχετε χεῖρα μυλαῖον ἀλετρίδες, εὐδετε μακρά,
 Κῆν ὄρθρον προλέγη γῆρυς ἀλεκτρούων.
 Δηὼ γὰρ νύμφαισι χερῶν ἐπετείλατο μόχθας,
 Αἱ δὲ κατ' ἀεροτάτην ἀλλόμεναι τροχίην
 Ἀζονα δινεύουσιν, ὃ δ' ἀκτίνεσσιν ἐλικταῖς
 Στρωφᾶται πισύρων κοῖλα βάρη μυλάκων.
 Γεύομεθ' ἀρχαίε βίότῃ πάλιν, εἰ δίχα μόχθε
 Δαίνυσθαι Δῆες ἔργα διδασκόμεθα.*

³ Jenſii Ver.

Epigr. Gr.

Rotterd. 1742. According to the Words of *Homer*⁴:

8.

Hering. Obſervatt. cap.

22.

Acad. des Inſcript. Tom.

II.

⁴ IX. Odyſſ. 100.

⁵ I. Oper. 117.

⁶ II. 21

Ἀλλὰ τά γ' ἄσπαρξα καὶ ἀνήροτα πάντα φύον' ἄι,
 Πυροὶ καὶ κριθαὶ, ἡδ' ἄμπελοι.†

And *Hesiod*⁵:

Κάρπον δ' ἔφερε Ζεῖδωρος ἄρουρα
 Αὐτομάτῃ πολλόν τε καὶ ἄφθονον.†

When Labour therefore, as I was observing, had given the Relish to their Enjoyments, it was natural for them to secure, what had cost them some Fatigue in the Preparation. *Hominibus*, says *Justin* of the *Scythians*⁶, *inter se nulli fines: Neque enim agrum exercent*. But as Boundaries and Land-marks, rather described, than fenced; rather pointed out where Avarice ought not to intrude, than secured the Pass where Violence would sometimes presume to enter, some collateral Security was thought necessary. And that Collateral Security was a general Agreement. There was a mutual Engagement to stand by each other in these Appropriations: And what we call LAW, was the Condition of the Obligation. Next, the Utility of these Engagements soon extended them beyond the considerations of Property: and it came to pass, that not only every Man's Right

* *Stertite jam famulae: cesset mola, brachia cessent.*

Stertite, dum Gallus provocat ore diem.

Anna Ceres liquidas operi succedere vestro

Naiadas, et manuum jussu obire vicem.

Scandit Nympha rotam celeri pede; vertitur axis,

Versatur celeri turbine rapta mola.

Rursum acvi veteris fruimur bona. Dat sua nobis

Munera non ullo parta labore Ceres.

Boivin.

† *Sed sine seminatione et Aratione omnia crescunt,*

Hordeum Triticumque atque Vites.

‡ *Fructum vero tulit benigna tellus*

Sua sponte multum et divitem.

was fenced in with proper Enclosures, but the Boundaries of the Human Passions also were as well regulated as their Estates: the Voice of the Law pronounced now in a general Language, *Hitherto may'st Thou come, but no farther*: and thus by a regular Process, the Culture of the Field ended in the Culture and Refinement of Manners.

It is thus, I observe, that these things have been considered by the Ancients:

*Cum prorepserunt primis Animalia terris,
Mutum et turpe pecus, glandem atque cubilia propter
Vnguibus et pugnis, dein fustibus, atque ita porro
Pugnabant armis, quae post fabricaverat usus.
Donec verba, quibus voces sensusque notarent,
Nominaque invenere, dehinc absistere bello,
Oppida coeperunt munire, et ponere leges,
Ne quis Fur esset, neu Latro, nequis Adulter⁷.*

⁷Hor. i. Serm.
III. 99.

Οἱ πρὶν μὲν ποτ' ἑναῖον ἐν εὐρυχόρῳ Ὑπερείῃ,
Ἀγχε Κυκλώπων, ἀνδρῶν ὑπερηνορέοντων,
Οἱ σφεας σινέσκοντο, βίῃφι δὲ φέρτεροι ἦσαν.
Εὐθεν ἀναστήσας ἄγε Ναυσίθοος θεοειδῆς,
Εἶσεν δ' ἐν Σχερίῃ, ἐκάς ἀνδρῶν ἀλφεισάων·
Ἀμφὶ δὲ τεῖχος ἔλασσε πολεῖ, καὶ ἐδείμαστο οἴκους.
Καὶ νηὲς ποίησε θεῶν, καὶ ἐδάσσατο ἀρέρας⁸.*

⁸ Homer.
Odyss. Z. 4.

*Necdum res igni scibant tractare, nec uti
Pellibus, et spoliis corpus vestire ferarum:
Sed nemora atque cavos montes, sylvasque colebant,
Et frutices inter condebant squalida membra,
Verbera ventorum vitare imbresque coacti.
Nec commune bonum poterant spectare, nec ullis
Moribus inter se scibant, nec legibus uti:
Quod cuique obtulerat praedae fortuna, ferebat,
Sponte sua sibi quisque valere et vivere doctus⁹.*

⁹ Lucret. V.
951.

*Condere coeperunt urbes, arcemque locare
Praesidium Reges ipsi sibi perfugiumque,
Et pecudes et agros divisere, atque dedere
Pro facie cujusque et viribus, ingenioque¹.*

¹ Id. ibid.
1107.

* Qui antea quidem habitabant in spaciola Hyperea,
Prope Cyclopa, viros superbientes;
Qui ipsos infestabant: viribus autem superiores erant.
Inde excitos deduxit Nausthous, Deo similis,
Collocavitque in Scheria, procul ab hominibus ingeniosis,
Circum vero murum duxit urbi, et aedificavit domos,
Et templa fecit Deorum, et divisit agros.

mutuus

mutuus ut nos

*Adfectus petere auxilium et præstare juberet,
 Dispersos trahere in populum, migrare vetusto
 De nemore, et proavis habitatas relinquere Sylvas,
 Aedificare domos, laribus conjungere nostris
 Tectum aliud, tutos vicino limite somnos
 Vt collata daret fiducia, protegere armis
 Lapsum, aut ingenti nutantem vulnere Civem?*

* Juvenal. XV.
 Sat. 148.

In this System therefore of the Heathen Archaeology, no wonder That the Blessings and Culture of Human Life, that Law, and the Comfort of orderly Society, were all owing to these useful Inventions. And thus They all acknowledge :

* Panegyri.

So *Isocrates*¹,

— τὰς κάρπυς, οἱ τῷ μὴ θηριωδῶς ζῆν ἡμᾶς αἴτιοι γεγόνασιν*.

Leges Ceres dicitur invenisse, quia ante inventum frumentum a Cere, passim homines sine lege vagabantur : quæ feritas interrupta est invento usu frumentorum, postquam ex agrorum divisione nata sunt jura².

² Servius ad
 Virg. IV. Aen.
 58.

*Prima Ceres unco glebam dimovit aratro ;
 Prima dedit fruges, alimenta que mitia terris :
 Prima dedit Leges³.*

³ Ovid. V.
 Met. 341.

*Maestant lectas de more bidentes
 Legiferae Cereri⁴.*

⁴ Virg. IV.
 Aen. 57.

*Fama minor factis : ipsos nam credere dignum
 Caelicolas, Tellus quibus hospita semper Athenae,
 Ceu Leges hominemque novum, ritumque sacrorum,
 Seminaque in vacuas hinc descendunt terras,
 Sic sacrasse loco commune animantibus aegris
 Confugium⁵.*

⁵ Stat. XII.
 Theb. 499.

*Primæ frugiferos foetus mortalibus aegris
 Dididerunt quondam praeclaro nomine Athenae,
 Et recreaverunt vitam, legesque rogarunt⁶.*

⁶ Lucret. l. 6.
 init.

*Κάλλιον, ὥς πολίεσσιν ἐαδὸτα ΤΕΘΜΙΑ δῶκε·
 Κάλλιον, ὥς καλὰ μὲν τε καὶ ἱερὰ δράγματα πρῶτη
 Ἀσυχῶν ἀπέκοψε, καὶ ἐν βόας ἤκε πατήσσαι,
 Ἀνίκα Τριπτόλεμος ἀγαθὰν ἐδιδάσκετο τέχνην⁷.†*

⁷ Callimach.
 Hymn. in Cer.
 ver. 19.

* — *Fructus, qui nos a ferino vivendi more revocarunt.*

† *Pulchrius dictu, ut civitatibus gratas leges dederit :
 Pulchrius, ut culnum et sacros manipulos prima
 Spicarum absciderit, et boves calcare immiserit,
 Quum Triptolemus in bona agriculturæ instructus esset arte*

Teque

Teque Ceres et Libera, quarum sacra, sicut opiniones hominum ac religiones ferunt, longe maximis atque occultissimis ceremoniis continentur, a quibus initiae vitae atque victus, legum, morum, mansuetudinis, humanitatis exempla hominibus et civitatibus data ac dispersita esse dicuntur *

* Cic. Verrin.
ultim. ad fin.

And again,

A quibus, inventis frugibus, et in orbem terrarum distributis, omnes gentes ac nationes vestri religione numinis continentur.

Emere ac vendere instituit Liber Pater — Ceres frumenta, cum antea glande vescerentur — Eadem prima Leges dedit †.

Θεῖναι δὲ φασὶ καὶ νόμους τὴν Ἰσὺν, καθ' ἕως ἀλλήλοις δίδοναι τὰς ἀνθρώπους τὸ δίκαιον, καὶ τῆς ἀθέσμης βίας καὶ ὑβρεως παύσασθαι, διὰ τὴν ἀπὸ τῆς τιμωρίας φόβον. Διὸ καὶ τὰς παλαιὰς Ἑλλήνας τὴν ΔΗΜΗΤΡΑΝ ΘΕΣΜΟΦΟΡΟΝ ὀνομάζειν, ὡς τῶν νόμων πρῶτον ὑπ' αὐτῆς τεθειμένων¹. *

Οὐκ ἄξιον δὲ παραλιπεῖν τῆς Θεῆς ταύτης [Cereris] τὴν ὑπερβολὴν τῆς εἰς τὰς ἀνθρώπους εὐεργεσίας. Χωρὶς γὰρ τῆς εὐρέσεως τὰ σίτη, τὴν τε κατεργασίαν αὐτῇ τὰς ἀνθρώπους ἐδίδαξε, ΚΑΙΝΟΜΟΥΣ Εἰσηγη-ΣΑΤΟ, καθ' ἕως δικαιοπραγεῖν εἰθίσθησαν. δι' ἣν αἰτίαν φασὶν αὐτὴν ΘΕΣΜΟΦΟΡΟΝ ἐπωνομασθῆναι. Τάτων δὲ τῶν εὐρημάτων ἕκ' ἂν τις ἑτέραν εὐεργεσίαν εὖροι μείζονα. Καὶ γὰρ τὸ ζῆν καὶ τὸ καλῶς ζῆν περιέχουσιν². †

And to conclude this Bead-Roll of Authorities (many, if not all, of which are doubtless anticipated by *P. Burman*, whose *Treatise de Cerere Legisera* I have heard of, but was never able to see) It is hence, that *Triptolemus* got the name of *Buzyges*, (and both *Buzyges* and *Triptolemus* a place among the Athenian Legislators³) because

primus

Duxit araturos sub iuga curva boves †.

Bovem et Aratrum Buzyges Athenienses: ut alii, Triptolemus †.

In conformity to what I have been observing, We read of Temples erected in honour of ΔΗΜΗΤΗΡ ΘΕΣΜΙΟΣ, ΘΕΣΜΟΦΟΡΟΣ or LEGIFERA. Such are often mentioned by *Pausanias* †.

III. Let me subjoin a few particular Reflections upon the subject of those Boundaries, or *Termini*, which I had occasion to mention lately.

* *Quin et leges statuiffe ferunt Isidem, secundum quas jus inter se homines communicarent, et ab exlege vita atque injuria, praeae metu desisterent. Ideoque Graecis veteribus Cererem Thesmophoron (id est, Legisferam) ut quae princeps leges sanciverit, appellari.*

† *Nique vero par esset hoc loco praeterire eximiam Deae hujus erga mortales beneficentiam. Nam praeterquam quod fruges reperit, operas etiam rusticas et usum illarum docuit, legesque promulgavit: quarum norma juste agere homines adfuerent. Quam ob causam Thesmophoron, id est, Legisferam, cognominari perhibent. Quibus sane inventis meritum vix amplius inveneris. Nam et vitam ipsam et bonam vitae institutionem complectuntur.*

† Plin. VII. 56.
Add. Herodot. II. 171.
Porphyr. de Abstin. &c. pag. 431.
Hieron adv. Jovinian.
Plutarch. de Esu Carn. l. 1. init et adv. Colot.
Clem. Alexandr. in Protreptic.
BaptPii Annotation. posterior. c. 9. apud Gruter. F. A. Tom. I. pag. 380.
Spanheim ad Callimach. l. c. Lil. Gyrard. Syntagm. Deor. Gent. 14.

† Diod. Sic. I. 14.
† Diodor. Sic. V. 5.

† Serv. ad Virg. I. Georg. 19.

† Tibull. I. 11. 46.

† Plin. VII. 56.

† See Lib. I. P. 59, 79.

† Lib. II. p. 147.
L. VIII. p. 480.
L. IX. 566.

† Edit. 1613.
Fol.

^o XII. Aen.
898.

*Limes agro positus, litem ut decerneret arvis.
Conveniunt, celebrantque dapes Vicinia simplex,
Et cantant laudes, Termine Sancte, tuas.
Tu populos urbisque, et regna ingentia finis:
Omnis erit sine Te litigiosus Ager.
Nulla Tibi ambitio est, nullo corrumpere auro,
Legitima servas credita rura fide.*

¹ Ovid. II.
Fast. 657.

² Deut. XIX.
14. XXVII.
17. Job
XXIV. 2.

It was necessary that Human Laws should not only guard the Separations they had made, but lend their Aid and Sanction to these Marks of Distinction also, which described them. This was very visible in the Jewish Legislation². And both Greeks and Romans gave their Injunctions all the Weight they were able, by mixing Sacred Considerations with Civil; by the solemn and awful Complexion of those Punishments, that attended the Removers or Destroyers of their Neighbour's Land-Marks; and by advancing their *Termini* to a State of Divinity. What was done by *Numa* in this regard, is worth consulting in *Plutarch's* Life of Him, and may be seen also in a very ingenious Discourse upon the Subject, in the *Memoires de l'Acad. Royale des Inscriptions*, and in the Writers upon

³ II. Fast. 639.

⁴ Add. Plu-
tarch. Quaest.

Rom. 15.
Gothofred. ad
D. Lib.

XLVII.

Tit. XXI.

DE TERMINI-
NO MOTO.

⁵ II. 74.

*Ovid*³, in his Description of the Roman *Terminalia*⁴.
Thus *Dionys. Halic.* in his Account of *Numa*⁵:

Εἰ δέ τις ἀφανίσσειεν ἢ μελαθροῖν τὰς ὄρας, ἱερὸν ἐνομοθέτησεν εἶναι τῷ θεῷ
τὸν τέτων τὸ διαπραξάμενον, ἵνα τῷ βελομένῳ κτείνειν αὐτὸν, ὡς ἱεροσυ-
λον, ἢ τε ἀσφάλεια καὶ τὸ καθαρὸν μιάσματος εἶναι προσῇ.*

Where there is a great deal more to be consulted upon this head. So
Plato before him:

Διὸς Ορίε μὲν πρῶτος ὁδε νόμος εἰρήσθω. Μὴ κινείτω γῆς ὅρια μηδεὶς μήτε
οἰκεία πολίτε γείτονος, μήτε ὁμοτέρμονος, ἐπ' ἐσχρατίας κεκλημένος ἄλλω
ξένῳ γειτόνων [f. ΓΕΙΤΝΙΩΝ], νομίσας ΤΟ ΤΑΚΙΝΗΤΑ ΚΙΝΕΙΝ ἀλη-
θῶς τῷτο εἶναι. Βελέσθω δὲ πᾶς πέτρον ἐπιχειρῆσαι κινεῖν τὸν μέγιστον ἄλ-
λον, πλὴν ὄρον, μᾶλλον ἢ μικρόν λίθον, ὀρίζοντα φιλίαν καὶ ἔχθραν ἑνορκον
παρὰ θεῶν. Τῷ μὲν γὰρ Ομοφύλιος Ζεὺς μάρτυς, τῷ δὲ Ξένιος, οἱ μετὰ
πολέμων τῶν ἐχθίστων ἐγείρονται. καὶ ὁ μὲν πεισθεὶς τῷ νόμῳ, ἀναίσθητος
τῶν ἀπ' αὐτῆς κακῶν γίγνοιτ' ἂν καταφρονήσας δὲ, ΔΙΤΤΑΙΣ δίκαις
ἐνοχος ἔστω. μιᾷ μὲν παρὰ θεῶν, καὶ πρώτῃ, δευτέρῃ δὲ, ὑπὸ νόμῳ. §

⁶ VIII. de
Legg. pag.
842.

* *Terminos si quis sustulisset, aut suo loco movisset, eum Deo Termine devovit, ut cuilibet impune eum interficere tanquam sacrilegum liceret, et purus ab eo piaculo esset.*

§ *Jovis Terminalis prima haec Lex sancitur: Nemo limites terminosve agri moveto cujusvis domini, sive civis, sive peregrini finitimi, si in extrema regionis parte habeat agros: ratus nefas esse haec movere, et in quae quadret illud dictum IMMOBILIA MOVERE: malitque quilibet ingens saxum movere, quam parvum lapidem, jurejurando a Diis firmatum, quo amicitiae et inimicitiae, interposita Deorum auctoritate terminentur. Alterius enim Jupiter Contribulis, alterius Hospitalis est Testis, qui cum infestissimis bellis excitantur. Qui legi obtemperaverit ex his incommodis quae legis violatae reos consequi solent, nullum sentito: qui contempserit, duplices poenas luito: primum quidem et maxime, Deo vindice, secundum, Lege ultrice.*

The Roman Law was very attentive to Transgressions of this sort. Something of the Malignity of the Crime, and of the Punishments in order to restrain it, may be seen in that Title of the Digest I lately referred to⁷, and what *Gothofred* and Others have observed upon it.

⁷ Sc. Lib.
XLVII.
Tit. XXI.

Nay, it went farther than most Constitutions carry'd this Consideration. The Field-Books, as I may call them, the Terrars of their Lands, though made to determine private Property, were looked upon as the public Muniments and Registers of the Country; and Those that altered or removed them, were punished in the Estimation of Offenders against the State:

*Qui Tabulam aeream, Legis, [without doubt Leges, as some Copies read] Formamve Agrorum, aut quid aliud continentem, refixerit, vel quid inde immutaverit, Lege Julia peculatus tenetur*⁸.

⁸ D. 48. 13. 8.
Pr.

That the Terrars of private Estates, and not of the public Demesnes, are to be understood here, I have no doubt (The Property might be *privati Juris*, but the Record was *publici*.) For it must not be omitted that Public Bodies had their Boundaries, as well as Private Possessors: and that not only in regard to Territory and Jurisdiction, but also to Seizures and Estates: And so *Dionys. Halic.* in the Place lately cited:

Τῷτο δὲ ἐκ ἐπὶ τῶν ΙΔΙΩΤΙΚΩΝ καὶ ἐξήσατο μόνον κήσεων τὸ δίκαιον, ἀλλὰ καὶ ἐπὶ τῶν ΔΗΜΟΣΙΩΝ, ὅροις καὶ κεῖνα περιλαβὼν, ἵνα καὶ τὴν Ῥωμαίων γῆν ἀπὸ τῆς ἀσυγείτονος ὅριοι διαιρῶσι θεοὶ, καὶ τὴν κοινὴν ἀπὸ τῆς ἰδίας. Τῷτο μέχρι τῶν καθ' ἡμᾶς χρόνων φυλάττεσι Ῥωμαῖοι, τῷ χρόνῳ μνημεῖα τῆς οὐσίας αὐτῆς ἐνεκα.*

It is easy to observe from hence, what was the CRIMEN PECVLATVS⁹, and how it stood distinguished from a common Action of FVRTVM: and this is no inconsiderable Instance of the Division which I formerly made of Law into PVBLIC and PRIVATE.

⁹ D. Lib.
XLVIII.
Tit. XIII.
C. Lib. IX.
Tit. XXVIII.

But I had a particular reason for mentioning the Limitations of public Lands, not only because they are as necessary to be ascertained, as private Estates, but to shew what Assurances the Study of the Roman Law has drawn from Sources, which to a vulgar Eye may appear but mean and inconsiderable.

*Agrum manucaptum limitatum fuisse, ut sciretur, quid cuique datum esset, quid venisset, quid in publico relictum esset*¹.

¹ D. 41. 1. 16.

Though this Reading is justifiable from the Authority of the Pisan (or Florentine) MS. and from what I have been observing concerning the Public Demesnes; yet is it possible that these may not here be meant: because from the known Courtesy of this People, One would expect some mention, in these Limitations, of what was surrender'd to the old Occu-

* Hoc autem Jus non solum in privatis agris constituit, sed etiam in publicis, illos quoque terminis complexus, ut etiam P. R. agrum a vicino, et publicum a privato Dii Terminales discernent. Hoc usquam ad nostram aetatem Romani servant, illius seculi monumentum, idque sanctitatis tantum gratia.

piers, who were entitled to some Distribution, if they were left upon the Spot, and escaped the Severity of the Martial Law, in the hard Sentence of *Veteres MIGRATE coloni*. For We read

*Si forte ager fuit, qui — militibus assignatus est, modico honoris gratia possessori dato.*²

²D. 6. 1. 15. 2.

³ De Condit.
Agrorum,
pag 206. Edit.
Goeshii.

So *Hyginus* ³:

Divisi et assignati agri sunt, qui veteranis aliisque personis per Centurias certo modo adscripto aut dati sunt, aut redditu veteribus possessoribus.

⁴ De Condit.
Agror. pag.
26.

And so *Siculus Flaccus* ⁴.

Nec tamen omnibus personis victis ablatis sunt agri: nam quorundam dignitas, aut gratia, aut amicitia victorem ducem movit ut quid eis relinqueret.

⁵ II. Observ.

9.

⁶D. 41. 1. 16.

Cujacius ⁵ therefore (that *DEVVS TERMINVS*, or *CEDO NVLLI* of the Civil Law, among the Moderns) observing the Text I am concerned in ⁶ to stand thus in one of his MSS. *QVIDVE P. RELICTVM ESSET*, and not, with the vulgate, *quid in publico relictum esset*, concluded in this most ingenious Correction, *QVID VETERI POSSESSORI RELICTVM ESSET*. For in the *Notae Juridicae* of *Valerius Probus* We find

V. P. R. *Veteri possessori Reddita, or Relicta.*

And here let me observe that These Notes or Abbreviations of *Probus* are recommended by *Jac. Gothofred*, as very useful to such as study the Civil Law, in his *Notitia Juris*, prefixed to *S. Leeuwius's Corpus J. C.* My Reader will find a large Collection of *Notae* or *Siglae Romanae*, by *Sertorius Ursatus*. No Assistance is to be slighted, which can turn to so good Account as that which We have just now seen.

The same Author, not without good reason (as the Subject shews, which I am concerned in) recommends the use also of those Authors which are left us, *De Finibus Regundis*. The Principal of which are *Siculus Flaccus*, *Julius Frontinus*, *Aggenus Urbicus*, *Balbus Menfor*, and *Hyginus*. These are well published by *Nic. Rigaltius*, at Paris, 1614, 4^{to}. and afterwards by *Goeshius*, Amst. 1674, 4^{to}. To these it would be proper to add what can be collected of the *Agrarian* Laws, and other Remains of Antiquity upon this Subject: many of which are collected in the Edition of *Goeshius*, as the *Lex Thoria* particularly, which is so much indebted to *Sigonius*. I have by me a curious Edition (by *Jacob Bracelleus*) of an old Instrument, containing an Agreement between the *Genuates* and *Veituri* in the times of the Repub. A. V. C. DCXXXVI. concerning a Partition of Lands. This has been republished, but I think, not with a proper Attention. Of this nature also is the *Heracleian Inscription*, of a singular Curiosity,

sity, first produced by *Mattaire*⁷, and afterwards printed by the illustrious *Scipio Maffei* in his *Museum Veronense*⁸.

Something also upon this Subject, viz. *de Gromaticæ Disciplinæ*, as it is called, may be seen in *Pithoeus*⁹, *Cujacius*¹, *Magius*², *Nerius*³, *Gothofred*⁴, and others.

The Simplicity of the first Ages know no other Boundaries, than to mark out their Allotments with a Stone, or any thing that lay ready at hand :

*Saxum antiquum ingens, campo qui forte jacebat,
Limes agro positus, litem ut discerneret arvis*⁵.

*Termine, sive Lapis, sive es defossus in agro
Stipes ab antiquis, sic quoque nomen habes*⁶.

*Nullus in campo sacer
Divisit agros arbiter populis lapis*⁷.

— *Aut campum mihi si vicinus ademit,
Et sacrum effodit medio de limite Saxum,
Quod mea cum patulo coluit puls annua libo*⁸.

That they were not always in this rude State is very natural to suppose. And I am perswaded, that the Heracleian Inscription just now mentioned, which opens with a difficulty to all who have dealt in it, is capable of no other Construction, than supposing it to describe the Marks or Figures by which Lands and Grounds were set out. Let my Reader judge.

ΕΦΟΡΟΣ ΑΡΙΣΤΑΡΧΟΣ ΉΗΡΑΚΛΕΙΔΑ.
ΜΗΣ ΑΠΕΛΛΑΙΟΣ. ΉΑ ΠΟΛΙΣ ΚΑΙ ΤΟΙ ΟΡΙΣΤΑΙ.
ΓΕ. ΤΡΙΠΟΥΣ. ΦΙΛΩΝΤΜΟΣ ΖΟΠΥΡΙΣΚΩ.
ΠΕ. ΚΑΡΥΚΕΙΟΝ. ΑΠΟΛΛΩΝΙΟΣ ΉΗΚΡΑΚΛΗΤΩ.
ΑΙ. ΠΕΛΤΑΙ. ΔΑΖΙΜΟΣ ΠΥΡΡΩ.
ΚΝ. ΘΡΙΝΑΞ. ΦΙΛΩΤΑΣ ΉΙΣΤΙΕΙΩ.
ΜΕ. ΕΠΙΣΤΤΑΙΟΝ ΉΗΡΑΚΛΕΙΔΗΣ ΖΩΠΥΡΩ.

When the Land-mark became deified, and had the Title of *Deus Terminus*, his Figure took a little Polishing, but seldom was carry'd farther than what We now call a *Term*, a *Cippus*, or *Hermes*.

The ancient Statuary has been thought by some to have arose from this Figure, viz. a Head of the Person to be represented, placed upon something like a Pedestal, or the *Figura Terminalis*, a Column of Stone, broad at Top, and tapering downwards. Many of which are still preserved by the care of *Fulvius Ursinus*. But a late ingenious Writer⁹ has very successfully shewn, that this Figure was entirely owing to the Egyptians, which gave Birth, in her Mummies, to the Sculpture and Statuary of other Nations. Such therefore for a long time were the *Ανδριάντες* or Statues of the Ancients : It was left to more modern Artists, to release the Limbs from that Aegyptian Bondage, and give them Life, and Air, and Spirit. Whence

M m m 2

it

⁷ Lond. 1736. Fol.

⁸ Veron.

1749.

Fol. pag.

ccccxxv.

⁹ II. Subsecif. 14.

¹ II. Observ. 9. X. 2. XI. 5.

² IV. Miscell.

7.

³ II. Analect. 19.

⁴ ad D. 48. 13.

8. D. and Lib.

XLVII. Tit.

XXI.

⁵ Virg. XII.

Aen. 898.

⁶ Ovid. II.

Fast. 641.

⁷ Senec. Hip-

polyt. 170.

⁸ Juvenal.

XVI. 37.

it was that *Plato* the Comic Poet, doubtless in his Comedy intitled *Daedalus*, gave those Improvers of the fine Arts, this handsome Compliment:

Τὰ Δαίδαλεια πάντα ΚΙΝΕΙΣΘΑΙ δοκεῖ,
Βλέπει [lege ΒΑΛΕΠΕΙΝ] τ' ἀγάλμαθ' ².*

² Apud Tzetz.
Chiliad. l. 19.

And this Progress from Mummies to Statuary may in some measure be seen in a Figure which *Maffei* has given us ³.

³ Museum
Veronense.
pag. XLVII.
Tab. l. Fig. 6.

I COME NOW to consider more distinctly, what is meant by PROPERTY, and what are the Effects of it. When Writers tell us of *Negative* and *Positive Community*, if by One they mean that absolute Community, which is the Idea of the State of Nature, where all things were common to all; and by the Other, that Community, which is limited to a Few, and denied to all the rest of Mankind, I think they might have spared their Distinction. For what is the last, but a *Species* of Property, the Property of a People, Company, a College, a Corporation, or a Set of Partners in Trade? And, indeed, if they would but attend to the Process, it is that Principle, upon which Property first set out, as will be seen in the following Observations.

By Community therefore in general I mean the same, which they do by their Negative Community; viz. That System or Face of Things, called a State of Nature, where Lands, Goods, *etc.* belonged to, were appropriated to, or had by, Nobody. They belonged to Nobody in particular, or, in other words, to all alike, that is, not *positively*, or by any human Institution, but *negatively*, because Nobody had a right to separate them, in exclusion to Many, or to Every body else. They were therefore called *Res Nullius*, *Res in medio posita*, capable indeed of being appropriated, when the Act of Man made them so, but till then, *nullius Juris*.

Sunt autem privata nulla natura: sed aut veteri occupatione, ut qui quondam in vacua venerunt; aut victoria, ut qui bello potiti sunt; aut lege, pactione, conditione, sorte ⁴.

⁴ Cic. I. Of.
fic. 7.

Aedem Saturni Romani aerarium esse voluerunt, quod tempore quo incoluit Italiam, nullum in ejus regno furtum esset commissum, aut quia sub illo nihil erat cujusquam privatum — Ideo apud eundem locaretur Populi Pecunia communis, sub quo fuissent universa communia ⁵.

⁵ Macrobi. I.
Saturn. 8.

And hence the *Saturnalia* of the Ancients, which were meant to revive the memory of this primitive Simplicity; and to represent that even State of Mankind, where there was no *Meum et Tuum*, no Bond and Free ⁶. And to this *Justin* adds his Testimony ⁷.

⁶ Lucian. in
Saturn. § §
19. 32. et
alibi passim.
Athen. VI. 19.
Lipf. I. Sa-
turn. 19.
⁷ LXIII. 1.

Italiae Cultores primi Aborigines fuere: quorum Rex Saturnus tantae justitiae fuisse traditur, ut neque servierit sub illo quisquam, neque

* *Daedaleae autem omnes movere videntur,
Et videre Statuae.*

quic-

quicquam privatae rei habuerit : sed omnia communia et indivisa omnibus fuerint, veluti unum cunctis patrimonium esset. Obcujus exempli memoriam cautum est, ut Saturnalibus exaequato omnium jure passim in conviviis Servi cum Dominis recumbant.

*Nam propriae Telluris herum Natura neque illum
Nec me, nec quenquam statuit⁸.*

Pater ipse colendi

*Haud facilem esse viam voluit, primusque per artem
Movit agros, curis acuens mortalia corda :*

Nec torpere gravi passus sua regna veterno.

Ante Jovem nulli subigebant arva coloni :

Nec signare quidem, aut partiri limite campum

Fas erat : in medium quaerebant : ipsaque tellus

Omnia liberius, nullo poscente, ferebat⁹.

⁸ Hor. 2. Sat.
ll. 129.

⁹ Virg. I.
Georg. 121.

To avail ourselves of that quotation from Tully, let us see how it stood in the first and earliest view of it, viz. *veteri occupatione*.

It is not hard to conceive, that in the beginning of the World, or a little after the Flood, when the Inhabitants of this Globe were few in number, vast Tracts of undescried Country, great Quantities of unoccupied Cattle, were in no Man's Possession, for they were not even in their knowledge. Nay the Lands and Goods, that lay before them, and served their immediate uses, must be supposed to continue some time in their original State, namely, as long as they were undivided, and not distinguished into separate Shares or Propertys. Their Use was in common, their Property vested in no one. For when God gave to Man, at the beginning, Dominion over the Earth, and over every thing in it¹, He is not to be supposed necessarily to imply what we emphatically call *Property*, or distinct Dominion. Every Man, that was to be born into the World, had an Interest in the *Bona Naturae*. Property was only a Mode, not a necessary one, of exerting that Interest. It was left to human Invention to settle the manner, and to describe, how those Things should be enjoyed. It was in itself indifferent to Providence, whether Man enjoyed them in common, or cut them out into shares. I say indifferent in its own nature. For *neither* was it *prohibited* by the Law of Nature to hold things in common, *nor* was it *prohibited* to separate them. Which is the exact idea of what the Schoolmen call the *Law of Nature Negative*. But Use, Emolument, Convenience, and the general Good of Mankind, which was the next thing to be taken into the Account, declared loudly in preference of the latter Method. The Improvement of Mankind called for it. The Culture of the Earth, and the Refinements of Life could not be so successfully recommended, as by giving an edge to Industry, and a free Scope to Art and Science. And this could not well be effected, but by marking out to Individuals, what they could properly call their Own.

So

PROPERTY.

So that for some Time, while this Community lasted, here was an *Enjoyment without Property*. No Man seemed to have a right to dispose of what he had laid his hands upon, but to make use of it. And therefore this Situation of Mankind was *Communio Vfus* only. No body had the Property of any thing, and every body, in a manner, had the Use of every thing. This State may be sufficiently understood by the following Comparisons.

² Cic. III. de
Fin. 20.

*Quemadmodum Theatrum cum commune sit, recte tamen dici potest, ejus esse cum locum, quem quisque occupavit*².

³ Senec. VII.
de Benef. 12.

*Equestria omnium Equitum Romanorum sunt: In illis tamen Locus meus fit proprius, quem occupavi — Habeo in Equestribus locum, non ut vendam, non ut locem, non ut habitem, in hoc tantum, ut spectem*³.

But when the World began to be peopled, and large Colonys were draughted off in search of Settlements: the new Tracts of Land, which were before in their natural State, or primitive Condition, did now *cedere occupantibus*. There is all the reason in the World to think, that they set out in large numbers. Their Conveniency, if not their Safety, required it. These new Countries therefore were seized first, in the name, and on the behalf, of the People collectively. It might be some time afterwards (it was not necessary it should be so at once) that to avoid disputes, or for other good purposes, private People had their Assignments by Lot or Distribution, or some other Method of Designation.

Private Property was therefore consequent to Public: and the Lawyers have ranked them accordingly:

⁴ D. 1. 1. 5.

*Discretæ Gentes
Dominia distincta.
Agris Termini positi*⁴.

The Consideration of this gradual and successive Appropriation of Lands and Goods, first by the People collectively, or in their Aggregate Capacity, and, in the next Step, by separating Portions and Districts for Individuals — *partiri limite campum* — I say, this Progress of Property will furnish us with some useful Observations.

⁵ II. 2. 4.

1. Lands and Goods were first, *jure Occupationis*, to be esteemed in *Bonis Vniversitatis*. And next, another Species of Property, was vested of the same Lands and Goods, in private Hands, without any prejudice to the former Right; for they could both subsist very well together. The former *Grotius*⁵ calls *Occupatio per Vniversitatem*, the other *per Fundos*.

⁶ Dio Chry-
sostom. in
Rhodiac. 31.

Ἡ χώρα τῆς πόλεως, ἀλλ' ἔθεν ἥττον τῶν κεκτημένων ἕκαστος κύριος ἐστὶ τῶν ἑαυτῶν⁶.*

* *Territorium est Civitatis: nihilominus tamen, possidentium quisque rerum suarum dominus est.*

So

So that when Tully⁷ writes, *Sunt autem privata nulla natura—ex quo*⁷ I. Offic. 7. *fit ut Ager Arpinus Arpinatium dicatur, Tusculanus Tusculanorum*, Nothing forbids but it may be true also, that some of the *Ager Arpinus* might be the private Property of Tully; and of the *Ager Tusculanus*, the Property of Cato, which very probably was the Case.

Jure Civili omnia Regis sunt: et tamen, illa, quorum ad regem pertinet universa possessio, in singulos dominos descripta sunt, et unaquaeque res habet possessorem suum. Itaque dare regi et domum et mancipium et pecuniam possumus, nec donare illi de suo dicimur. Ad reges enim Potestas omnium pertinet, ad singulos Proprietas. Fines Atheniensium aut Campanorum vocamus, quos deinde inter se vicini privata terminatione distinguunt, et totus ager hujus aut illius Reip. est: pars deinde suo domino quoque censetur, Ideoque donare agros nostros reip. possumus, quamvis illius esse dicantur: quia aliter illius sunt, aliter mei⁸.

⁸ Senec. VII. de Benef. 4.

2. This leads us to a very useful Distinction between what is called *Dominium Eminens* and *Dominium Vulgare*⁹.

Private People had Portions of Lands allotted or assigned them, with a reservation of the public Interest in those very Possessions. And therefore this subordinate Property, or *Dominium Vulgare*, was a kind of tacit Agreement that these Lands should be the Property of private Men—as long as the Public did not want them. And we therefore find these two Tenures differently expressed, and carefully distinguished, though not always with the exactest uniformity. For sometimes, as in the last Quotation,

⁹ Grot. I. 1.6. II. 14. 7. III. 20. 7. Pufendorf. VIII. 5. 7. Muelen. ad tit. D. de J. et J. pag. 162. seqq.

Ad Regem Potestas omnium pertinet, ad Singulos Proprietas.

Again¹,

Omnia Rex Imperio possidet, Singuli Dominio.

¹ Id. Senec. Ibid. 5.

3. In Virtue of this *Eminens Dominium* the State has such a Right over the Property of Individuals, as to moderate, restrain, set bounds to, or direct, their Enjoyment of them, and Dominion over them, in such manner as shall best suit with the public Interest.

And this has always been attended to, in most of the Definitions given us of Property.

Jus in Re, quo Res est nostra, sic ut de ea libere disponere possimus, nisi Lex vel Conventio obstet.

Propria cujusque Facultas et Jus in Rem quamlibet, quam in sui ipsius commodum usurpare potest quocunque usu lege permisso.

Hence, though nothing seems so reasonable, and so agreeable to the Idea of Property, as to give what is our own to whom we please, yet is it open to Law to ascertain a particular Sum, beyond which no Gift shall

shall be valid, unless it be transferred by a Deed, or some authentic method of Conveyance.

Thus the Laws *Aelia Sentia* and *Fufia Caninia* restrained immoderate and improper Manumissions. The Laws for regulating Testamentary Dispositions are innumerable in the Roman Constitution, and in those of all other Nations. So with us no Lands could be devised by Will before the Time of *Henry VIII.* Nor could Peers alienate before *Henry VII.*

It is upon this Principle also, That the Public interposes against the Wantonness of private Persons in the mismanagement of their Goods; That We see the reasonableness of Sumptuary Laws, and the propriety of that Doctrine which *Justinian*³ lays down, *Expeait Reip. ne sua re quis male utatur.*

The Annotators, to their great Credit, have been very careful in marking out the *Antinomiae* or Contradictions of the *Justinian Law*; but they have sometimes overshot the Mark. And I think we have an Instance of it in the Passage before us. *Immo licet*, says one of them, *alicui re sua abuti.* In proof of which he quotes the following Law:

Quemcumque igitur sumptum fecerint [bonae fidei possessores] ex hereditate, si quid dilapidaverunt, perdiderunt, dum re sua se ABVTI putant, non praeestabunt.*

⁴D. 5. 3. 25.
11.

But He is most certainly mistaken. *Abuti* here does not answer to *male uti*: nor is it to be translated by our English word, *ABVSE*. Something of this before⁵ and more I have to add upon a proper Opportunity.

⁵ Above, pag.
232.

It is owing moreover to this Principle, that the State, or the Law of the Country, interposes against *Monopolies*, regulates the Price of Provisions, inspects the Markets, and gives Laws to those who are disposing of their own Produce and the Fruits of their Labour.

4. In Virtue of this Dominion, the Public has not only a Right of Disposition, or *Regulation*, in private Propertys, but a Power of *Resumption* also. For these Things were lent, not given⁶. It would be very unreasonable, if the State, or Those who preside over it, could not in the extreme and imminent danger of the Common-Wealth, apply the Property of an Individual to the Safety of all, in which Safety that of the Individual is comprehended: especially as this private Owner holds only under the Public, and these Possessions were understood to be conveyed to him upon these Conditions, and under these Reservations. Let it be remembered however, that this Person has a Right of Recovery, when the Public is in a Condition to allow it. He ought not to bear the Burden alone, but be repayed by a general Contribution, his Quota or Share deducted.

⁶ Above, pag.
60, 61. 176.

And this Right shall be exerted, not where the Safety, but the Expediency only, of the State is concerned, though indeed in a less rigorous

rous

gorous degree, and with a proportionable Abatement. It is thus a Man may be compelled to part with his Grounds, if the public Interest wants the Exchange of them: but that, as I observe, only upon an Exchange, or for an Equivalent, *justo precio*. For here the Public does not want his Property, but the Site of it.

Under this Head having seen what *Public* Exigence can do, let us invert the Prospect, and see what is owing to *Private*. For it will follow from the Observations which we have made of Property in general, that People in extreme necessity have a Title to see their natural Right revived: and the Operations of Property, *quoad hoc*, and in regard to themselves, for a while suspended.

Providence, or the Author of Nature, as we have seen, gave the World to its Inhabitants universally for their Use and Enjoyment. The Invention of Property was a sort of Convenience, not Necessity. It was only a Mode of Having or Enjoying, which was found in general to be useful and commodious. And therefore if a Man had a Right by the Primary Law of Nature, or the Appointment of its Author, to the Blessings of Providence, the Secondary Law, which is only of Human Appointment, cannot extinguish or defeat it⁷. But this Case is subject to many Restrictions, as the last and utmost Necessity—a moderate and careful Enjoyment—and a full Restitution upon the very first Opportunity. ⁷ Grot. II. 2. 6. — 10.

FROM THE NOTION We have conceived of Property therefore in the foregoing Reflections, We come at a Knowledge of what is meant by *Furtum*; sc. the Violation, or the Invasion of it, in a fraudulent and clandestine Manner (I pass by the more violent and public ones): As also, how We must understand the Lawyer, when He says⁸, *Furtum natura turpe est*: and again⁹, *Furtum Lege Naturali prohibitum est admittere*: So *Quintilian*¹, *Is cui Res furto ablata est, a natura habet actionem*: Or, how to answer that Question, *In what Sense can Furtum be a Breach of the Law of Nature? How can natural Law direct me to abstain from other People's Goods, when by the Law of Nature there could be no such an Idea, as that of other People's Goods?* A great deal has been said already to this Point, particularly in the Section upon the Law of Nations² and elsewhere. But I chuse to answer it in the Words of the very learned Bishop *Stillingfleet*, because the Passage I shall produce from him will also strengthen what I have been lately considering. ⁸ D. 50. 16. 42. ⁹ Declam. 316 ¹ D. 47. 2. 1. 3.

“ *Adam* had in himself the intire and original Dominion over all those things, which after became the Subject of particular Property; when his Posterity found it necessary to make and allow several Shares and Allotments to distinct Families, so as they were not to incroach or break in upon one another. But the Law of Nature did not prescribe the Way and Method of Partition, but left that to Occupancy or Compact. And so the Heads of Families upon their Settlement in any Country had a two-fold Obligation upon them. The First was to preserve the Interest of the whole Body, to which they still were

N n n

“ bound,

" bound, and were to shew it upon such Occasions as required it. The
 " Next was to take particular Care of those Shares which belonged to
 " themselves, so as to improve them for their Service, and to protect
 " them from the Invasion of others. And although this Division of
 " Property was not made by any antecedent Law, yet being once made,
 " and so useful to Mankind, the Violation of it, by taking that which
 " is another's Right, is a manifest Violation of the Law of Nature ⁴."

⁴ Stillington's Works,
 Vol. III. p.
 614.

⁵ D. 47. 2. 1. 3.

Furtum is defined by *Paulus* ⁵, *Contrectatio rei fraudulosa, lucri facienda gratia, vel ipsius rei, vel etiam usus ejus, possessionisve.*

For, to use the Words of a good Author :

Si haec Conditio est, ut, quicquid in usum hominis cessit, proprium sit habentis, profecto quicquid jure possidetur, injuria aufertur.

I have some few Remarks to make upon the Subject of Theft.

1. *Paulus* in the Law last-cited, and other Writers also, are greatly taken up in the Etymology of *Fur* or *Furtum*. Of that there can be no doubt to any one who is sensible how much the Roman Language is indebted to the Greek. I would only observe the Mutability of Language in general ; and suggest to my Reader, that *Fur*, was sometimes capable of a softer Sense :

⁶ Virg. III.
 Ecl. 16.
 Servius ad loc.
⁷ Aſin. II. 4.
 14.

Quid Domini facient, audent cum talia Fures ⁶?

As perhaps this Passage in *Plautus* ⁷ is thus best understood :

*Abscede, et sine me hunc perdere, qui semper me ira incendit :
 Cui nunquam unam rem me licet semel praecipere furi,
 Quin centies eadem imperem atque ogganiam*

⁸ Eunuch. IV. As is this of *Terence* most undoubtedly ⁸ ;
 7. 6.

Vbi Centurioſt Sanga, et manipulus Furum ?

It is well known that *Latro* is in like manner equivocal.

*Latrones eos Antiqui dicebant, qui conducti militabant, ἀπὸ τῆς λαλῆείας,
 at nunc viarum Obſeſſores dicuntur* ⁹—

⁹ Festus.

It may be entertaining enough to follow these Revolutions of Language, for those who have Leisure. To instance in one or two : *Hostis*, between the time of the XII. Tab. and that of *Cicero* shifted its Signification considerably :

¹ Cic. I. de
 Offic. 12.

² Festus.

³ Cic. III.

Fam. 8.

⁴ See Honore

de SainteMa-

rie, sur la Che-

valerie, pag.

6 and 7.

⁵ Jullin. II. 3.

Qui proprio nomine perduellis esset, is Hostis vocaretur, lenitate verbi tristitiam rei mitigante : Hostis enim apud majores nostros is dicebatur, quem nunc Peregrinum dicimus. Indicant XII. Tabulae, etc. ¹

So it fared with *Leno*, *Factio* ², *Urbanus* ³, and with our Language in *Knave*, *Churl*, *Willain*, *Waler* ⁴.

Primus Scythis bellum indixit Vexoris Rex Aegyptius, missis primo leonibus [i. e. legatis] qui hostibus parendi legem dicerent ⁵.

Though

Though I am sensible, that many MSS. and one very accurate Edition [the *Juntine*] read *Legatis*: And that a Critic of no small Reputation, discards the Word intirely from the Text, and shews how well it will stand without it ⁶.

This *Euphemismus*, or Tendernefs of Expression, is common to all Languages whatever. I have spoke to it in my Commentary upon the *Sandwich Marble*⁷; and it has been the Occasion sometimes of bringing very innocent Words into bad Repute. We see some Instances of this in *Boxhornius' Origines Gallicae*, and Dr. *Davies' Welch Dictionary*, in regard to the other Sex. Sometimes the Custom has shifted, and *v. v.* given a foul Name to an honest Employment. For I would observe, that if ever *Meretrices* in our Law-Records stood for *Lotrices* (as it is maintained), and if it be true, what I have heard, that there was discovered some time ago, over one of the Doors belonging to a Palace of Cardinal *Woolsey*, this Inscription, DOMVS MERETRICVM DOMINI CARDINALIS: Then it would be but Justice to my good Lord Cardinal, to suppose it only an Inscription, of no very sterling Latinity, directing us to his Laundry.

2. To constitute the Idea of *Furtum*, there must be a *Dolus malus*:

Fur est, qui dolo malo rem alienam contrectat ⁸.

And therefore I am perswaded, that the *Dolus* in *Horace*⁹

*Te, boves olim nisi reddidisses,
Per dolum amotas—*

is not to be understood of *Dolus Malus*, but is something equivalent to *Ludus* or *Jocus*. The *Actio Rerum Amotarum*¹, which is also alluded to in this Passage of *Horace*, was a distinct Consideration from an Action of Theft. It was where the Party in Fault, by the tendernefs of the Law, was supposed to have some Interest, Share, or Property in the Goods so taken: As in the case of a Wife, or a Son ².

3. The *Contrectatio Rei* is also a substantial Part of the Definition. It is from hence, that with the Ancients, *Tangere* was *Furari*³, and that *Cujacius*⁴, whose every work is Praise, very happily restored that Passage in *Tully*:

Quaestorem nemo dignum putat: Etenim est levis, libidinosus, tagax ⁵.

Not *salax*, nor *rapax*. How therefore Theft can be committed *sola mente atque animo*, which *Gellius* maintains⁶, is hard to imagine, nor do the Lawyers allow it in the strict Sense of *Furtum*. *Gellius* doubtless must refer it to the case of *Accessaries*, but then there must be a *Contrectatio* somewhere.

4. Another Ingredient in the Idea of Theft is the lucrative Disposition of the party offending: *lucri faciendi gratia*. And hence therefore it will follow, that what a Man takes to relieve his very urgent Necessity, is not Theft (nor indeed according to our Observations a

⁶ Heuman.
Parerg. Critic
P. 37.

⁷ pag. 58.

⁸ Paul. II. Sent.
tent. 1.

⁹ 1 Od. X. 10.

¹ D. Lib.
XXV. Tit. II.

² Above, pag.
285.

³ Taubman.
ad Plaut. Tri-
num. IV. 2. 96

⁴ VI. Observ.

⁵ VI. ad At-
tic. 3.

⁶ XI. 18.

Page or two ago, is the Thing He takes, properly *Res aliena* for that time, *durante necessitate*, and *revertente Communione*). It is no bad Law, what is in the Mouths of our Vulgar, *Necessity has no Law*. It has been said so before, upon good Authority.

^a D. 47. 9. 3. 7.

Nec enim injuria hoc fecit, qui se tueri voluit, cum alias non posset^s.

The Malefactor, who flies from Prison to escape a Fire, or what would have endanger'd his Life, is not deemed *Effractor Carceris*.

5. The Ancients made a great Distinction between a Theft committed by Day, and by Night. The Laws of the XII. Tables distinguished also between them, as did the Laws of *Plato*⁹ and of *Solon*¹, and as the Divine Law before them all². The Ground of this Distinction, the Reasons why Impunity should attend the Slaughter of the One, and not of the Other, are discussed by *Grotius*³, *Pufendorf*⁴, and their Commentators⁵.

⁹ De Legg.
L. IX. pag.
874. Ed. H. S.
¹ Demosth.
pag. 406.
Tom. III. Ed.
Cant.

² Exod. Cap.
XXII. init.

³ II. 1. 12.

⁴ II. 5. 17.

⁵ Add. Petit.

Legg Attic.

Lib. VII. Tit.

V.

Scriptores ad

XII. Tabb.

Ger. Noodt. I.

Observ. 15.

and I. Probab.

Juris 9.

Oisfel ad Caii

Instit. II. 10. 1.

Pariator, five

Auctor. Col.

lat. Mos. et

Rom. Tit.

VII. and Pi-

thoeus, etc.

ad loc.

⁶ Gellius XI.

ult.

⁷ See above,

pag. 159.

Hen. Ste-

phani Praef.

ad Fontes J. C.

It is very proper that Law should enter into the Consideration of such Circumstances, as enhance or abate the Malignity of the Offence, or such as contribute to discover or conceal the Offender. Which chiefly affect the present Case, as the Authors I here refer to, will inform you farther. It is thus that the Law of this Country distinguishes between Larceny and Burglary, which last answers to the *Furtum Nocturnum*, but with the additional Idea of breaking into a Dwelling-House for that Purpose. So it distinguishes also between *Furtum* and *Latrocinium*, if I may be allowed to give that Appellation to Robberies committed on the Highway, and attended with that aggravating Circumstance, *viz.* the Apprehension of Personal Danger.

6. The Punishment of Theft has been a Matter of much Speculation⁶.

The Legislation of *Draco* is too fantastical to be attended to, who punished not only all Thefts, but all Crimes, alike⁷. Many Lawyers have been of Opinion, (and that Question has been often debated) that a Capital Animadversion, or the Loss of Life is not an adequate Punishment for the Interruption or Invasion of another Man's private Property: and that no Proportion is given between the Value of the Thing stolen, and the Life of the Criminal: the *Quantum* of the Goods, and the *Quantum* of the Sufferance. The general answer to this is, that the Proportion is not to be drawn between the Punishment and *Subject-Matter* of the Offence, (for if a Soldier should be punished with Loss of Life for sleeping upon Duty, it is ridiculous to urge the Cruelty of putting a Man to Death for sleeping) but many Circumstances are to be taken into the Account; as the Easiness of committing the Fact, the Difficulty of coming at the Offender, the Frequency of the Crime, with many others, as We have in some measure seen under the Head We are just parted from. A more exact Discussion of this, would lead us into an Examination of the Nature and Rules of Human Punishments, which is not my Business at present⁸. Something upon this Question, and upon Theft in general, in that Chapter of *Gellius*, which I had occasion to refer to lately.

⁸ See Grot II.
20. 28. — 37.

HAVING

HAVING IN some measure seen the Origin and Principles of Property, We shall now consider briefly the Subject of it, RES, the Things We appropriate; and afterwards the different Degrees, Sorts or Modes of Dominion, Property or Possession.

RES, by which the Roman Lawyers mean in general, whatever is, or can be, the Subject of Property, is the Attention of *Justinian* in his II^d and III^d Books throughout, and as far as the fifth Title inclusive of his IVth and last Book.

Now the THINGS themselves are differently expressed: For *Res* is one Idea, and *Pecunia* another.

One would be apt to imagine, that *Pecunia* was with them, as general a Term, as it is possible to invent:

Pecuniae verbum non solum numeratam pecuniam complectitur, verum omnem omnino pecuniam, hac est, omnia corpora. Nam corpora quoque pecuniae appellatione contineri nemo est qui ambigit⁸.

⁸ D. 50. 16. 178.

Pecuniae nomine non solum numerata, Pecunia sed omnes Res, tam Soli quam Mobiles, et tam Corpora quam Jura continentur⁹.

⁹ l. 222. eod. Add. C. 4. 18. 2. 1.

Pecuniam, Aurum, Argentum, Possessiones; breviter dico, Pecuniam. Totum enim quicquid Homines possident, — Pecunia vocatur: Servus fit, Vas, Ager, Arbor, Pecus¹.

¹ D. Augustin. de Discipl. Christian. §6. Tom. VI. pag. 585.

And yet *Res* and *Pecunia* have at other times a notable Difference, and *Res* is the more extensive Term of the Two¹.

Rei Appellatio latior est quam Pecuniae: quae etiam [i. e. Res] ea, quae extra computationem patrimonii nostri sunt, continet: cum Pecuniae significatio ad ea referatur, quae in Patrimonio sunt².

² See D. 12. 1. 1. fin.

Res therefore are such Things as may be possessed: *Pecunia* such as are⁴.

³ D. 50. 16. 5. pr.

Let it be remember'd, that what I have been saying, must be understood of RES in *Sensu utili et habili*, if I may so express it. For there are some Things in the Consideration of Law, which neither are, nor can be, the Subject of Property; and some again which are not, but however are capable of being so. To explain this, and to reduce what has been often debated upon this Head to a System, I might divide *Res* after this manner,

⁴ Huber ad. § 1. J. de R. D.

Nullius Juris. Alicujus Juris.

But for many Reasons I shall draw off *Res nullius Juris*, and consider, by itself, what is to be understood by that Expression, and then form a competent Division without Embarrassment, and to which there can lie no Objection, in the Manner and Form following:

Res

Divini Juris.

Humani Juris.

Sacrae. Religiosae. Sanctae. Communes. Publicae. Universitatis. Singulorum.

RES

PROPERTY.

RES NVLLIVS.

Res Nullius sometimes mix with one Class, and sometimes with the other: *Hoppius* has branched them off very successfully in the Order I now subjoin:

Things are said to be No-body's, *Nullius in Jure*, either *Actu et Potentia simul*, or *Actu solo, licet non Potentia*.

The former are such as neither are occupied, nor can be: These are *Res Divini Juris*, Things consecrated, or set apart for religious Purposes³, Things *extra commercium humanum*, not all indeed *sua natura*, but what the Will of Mankind has made so. What are meant by these, will be seen below.

Again: *Res Nullius actu solo* are such, as are not really and properly occupied, but nothing contradicts their Capacity of being so: such as Nobody indeed is possessed of To-day, but what would imply no Contradiction, if they were seized or inclosed To-morrow. And they are of three Sorts:

1. Things that lie in Common; Parts of the World not yet discovered, and Animals, *etc.* not seized or claimed. These, though possibly they would rank under the Class of *Res Humani Juris*, when they come to be appropriated, yet, till they are so, are said to be *Nullius*.

2. Of this Sort are *Res pro Derelictis habitae*, viz. such as once were appropriated, but by the Will of the Proprietor, are returned to their primitive State and Condition⁴.

³D.Lib.XLI.
Tit.VII.PRO
DERELICTO.

3. To this Account also is brought *Hereditas jacens*, or an Estate in the Interval of Time, between the Demise of the last Occupier, and the Entry of the Successor.

I. RES SACRAE.

Of those Things, which are said to be *Divini Juris*, the first We find are *Res Sacrae*.

Such are understood to be *Res Deo rite consecratae*, Endowments of Churches; Goods, Utensils, *etc.* *quae non recipiunt aestimationem*⁵; which proper Authority has separated from prophane uses, cut off from the Circulation of Commerce, exempted from the consideration of Human Property, and settled upon *Holy* and Religious Purposes.

*Gallus Aelius ait Sacrum esse, quocunque modo atque instituto Civitatis consecratum sit, sive Aedis, sive Ara, sive Signum, sive Locus, sive Pecunia, sive quid aliud, quod Diis dedicatum atque consecratum sit. Quod autem privati suae Religionis causa aliquid earum rerum Deo dedicerint id Pontifices Romanos non existimare Sacrum*⁶.

⁵ Festus v.
SACER MONS.

And this conducts me to consider,

II. RES RELIGIOSAE.

Which according to the Authority of *Festus*, just produced, are those Things that are set apart for a serious Purpose, and distinguished

from

from common use, not by any public Rule or Authority, but by the particular and private Designation of the Possessor.

Sacrae Res sunt hae, quae publice consecratae sunt—Religiosum autem locum unusquisque sua voluntate facit, dum mortuum infert in locum suum⁷.

So Festus again :

Religiosum ac Sacrum est, ut Tempia omnia atque Aedes, quae etiam Sacratae dicuntur. At quod per se Religiosum est, non utique Sacrum est, ut Sepulchra quod ea non Sacra sed Religiosa sunt⁸.

And indeed the Difference between these Two, or rather all the Three, *Sacrae*, *Religiosae*, and *Sanctae*, is well pointed out by the same Festus in the very next Article : which will be well understood, if We add to it what Macrobius⁹, and Aldus Manutius¹, have observed upon this Subject.

III. RES SANCTAE.

These do not necessarily include the Idea of Holiness, but *Res Sanctione aliqua munitae*.

Proprie dicimus Sancta, quae neque Sacra, neque Profana sunt, sed Sanctione quadam confirmata².

In this Sense Laws³ are said to be *Sanctae*. In like manner the Gates and Walls of a City⁴, the Persons of Princes, of Embassadors⁵, of Magistrates⁶, Trophys, Boundarys, etc.

I made use above of the Word *necessarily*, i. e. strictly and of their own Nature. For *Res Sacrae* are sometime called *Res Religiosae*, as they are also *Res Sanctae* ; and indeed as they very well may, because they are that, and something more.

Sanctum esse interdum idem quod Sacrum, idemque quod Religiosum : interdum aliud, hoc est, nec Sacrum, nec Religiosum⁷.

Before I proceed to *Res Humani Juris*, it may not be improper to observe, that these *Res Sanctae* are more strictly of that sort also, or perhaps in a middle State between both. Whence Gaius⁸ pronounces with some Caution,

Sanctae Res, veluti Muri et Portae, quodammodo divini Juris sunt.

And it may not be amiss to observe, that *Res Sanctae*, though seemingly of the lowest Degree, yet in Regard to the public Authority, which gives them Being, rank with *Res Sacrae* in contradistinction to *Religiosae*.

And I take my leave of this Class or Set, by recommending my Reader to the Acquaintance of much better Authors upon the Subject, viz. *Holiday*⁹, *Reitz*¹, *Ernstius*², *Popma*³, *Brodaeus*⁴, *Nerius*, etc.⁵.

IV. RES COMMUNES

Are those, which by the Nature of them, sc. *Lying in Common*, in *Medio positae*, are *Res nullius* in regard to *Property*, but *omnium* in respect

⁷ D. 1. 8. 6.
³ et 4.
⁸ Festus v.
RELIGIOSVM.
⁹ III. Saturn.
3.
¹ I. Quaesit.
per Epit. 10.
² D. 1. 8. 9. 3.
³ D. 1. 8. 9. 3.
Hor. 2. Sat. 1.
81.
Above, pag.
171.
⁴ Cic. V. de
N. D. ult.
Plutarch.
Quaest. Rom.
27.
Id. in Romulo.
pag. 49. T. 1.
Scopp. I.
Collect. 28.
apud Gruter.
F. A. Tom. I.
D'Arnaud. I.
Var. Conject.
14.
D. 1. 8. 8. 2.
1. 9. § 4. eod.
D. 43. 6. 2.
⁵ Liv. III. 55.
⁶ D. 1. 8. 8. 1.
⁷ Macrobi. l. c.
Add. D'Ar-
naud. I. Var.
Conject. 14.
⁸ D. 1. 8. 1.
pr.
⁹ upon Juve-
nal. Sat. 1.
not. x.
¹ de Verbis
Ambiguis et
Mediis.
² ad Nep. in
Attico. c. 3.
³ de Diffe-
rent. Verbor.
⁴ V. Misc. 29.
⁵ II. Analect.
4, et 6.

respect to *Use* and Benefit. And indeed the Lawyers here extend the Consideration of *Res* to Physics.

*Naturali Jure omnium communia sunt illa, Aer, Aqua profluens, et Mare, et per hoc, litora Maris*⁶.

⁶ D. 1. 8. 2. 1.
Add. D. 41.
1. 14.

Under this Expression (*Res Communes*) are comprehended, not only *Things* in their original State of Inoccupancy, but even those, which, when Men set about Sharing, They also *left* so. For if there were some *Things*, which all the Art and Power of Man *could* not enclose or divide, as the Air, Sunshine, *etc.* there were also some, which they *would* not. The Subject-Matter of their Enclosures were such things, as would not suffice for the use of all Men universally, and yet were not wanted by all Men universally; while Those of the most general use, and at the same time, of the greatest sufficiency (*quorum innoxia est Utilitas*), still retain their natural State of universal Community.

*Quid autem non commune est, quod Natura optimum fert? Sol omnibus lucet. Luna innumerabilibus comitata sideribus, etiam feras ducit ad pabulum*⁷.

⁷ Petronius
Arbiter. cap.
100.

Litusque rogamus

*Innocuum, et cunctis auramque undamque patentem*⁸.

⁸ Virg. VII.
Aen. 229.
⁹ Ovid. I.
Met. 135.

*Communemque prius, ceu lumina Solis et Auras*⁹.

*Quid prohibetis aquas? Vfus communis Aquarum,
Nec Solem proprium Natura, nec aëra fecit,
Nec tenues undas. Ad publica munera veni*¹.

¹ Id VI. 349.

V. RES PVBLICAE.

² J. 2. 1. 1. Such are *Flumina, Portus, Litora, Itinera*².

It is hard to distinguish these from the last: and many Writers have therefore disregarded the difference. And indeed they are the same, only liable to a different Contemplation. For what are *Res Communes* in respect to the Law of Nature and of Nations, are *Publicae*, in the Consideration of Civil Law. Wherefore the Instances above, of *Flumina, Litora*, which are given as Instances of *Res Publicae*, are said to be *Common*, or rather the use of them, by *Vlpian*³; *Common*, because the *Innoxia Utilitas* is still open (at least to all the Members of that State) and yet in some Sense not *Common*, but *Public* rather, because in some measure appropriated, and under that Consideration no longer capable of being classed with *Res Communes*, which are *Res Nullius*.

³ D. 39. 2. 24.

*Litora, in quae P. R. imperium habet, Populi Romani esse arbitror*⁴.

⁴ D. 43. 8. 3.
Pr.

Nor does that Appropriation strictly coincide with Property. For these *Res Publicae* or *Communes*, are not the Property of the State, in the same Sense, in the same Degree, with the same Truth, as *Lands* or *Estates*, which are held by the Public.

Litora

Litora publica non ita sunt, ut ea quae in patrimonio sunt Populi, sed ut ea quae primum a natura prodita sunt, et in nullius adhuc dominium pervenerunt ⁵.

⁵ D. 41. 1. 14. pr.

Ger. Noodt therefore, who has examined this difficulty and taken great pains about it ⁶, advises us to consider ourselves as Members of two Communities, viz. the Universe; and that distinct and lesser Society, We respectively belong to. Now *Common* and *Public* mean the same thing: only when I use the one Expression or the other, I consider myself in this, or that Capacity. But the Inaccuracy of the elder Lawyers has occasioned much Refinement among the Moderns ones. And if We follow those, who make no Separation between *Res Communes* and *Publicae* ⁷, We shall probably take the wiser Course.

⁶ I. Probab. 8. et 9.

⁷ D. 1. 8. 2. pr.

VI. RES VNIVERSITATIS.

By *Vniversitas* is meant any aggregate Body or Society, such as a City, Company, College or Corporation. And the *Res* of that Body are either Those, in which the Public, or the Whole collectively, has a Property, and all the Individuals the Use; or Such, where the Individuals are excluded that Use. Of the first Sort:

Vniversitatis sunt, non Singulorum, veluti, quae in Civitatibus sunt Theatra, et Stadia, et similia, et siqua alia sunt communia Civitatum ⁸.

⁸ D. 1. 8. 6. 1. Add. D. Lib. XXX. Lex 122. pr.

Loca publica utique privatorum usibus deserviunt, jure sc. Civitatis, non quasi propria cujusque: et tantum juris habemus ad obtinendum, quantum quilibet ex populo ad prohibendum ⁹.

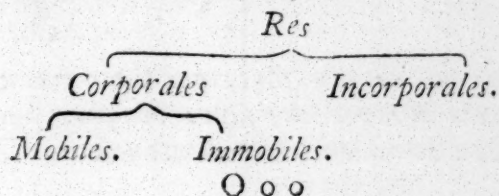
⁹ D. 43. 8. 2. 2.

Of the Second I understand the public Estates or Revenues, *ea quae sunt in Bonis, seu Patrimonio, Vniversitatis*. Where the Profits or Rents are not applied to the Emolument of any one or more Individuals, but to the public Treasury for public Uses. This is that kind of *Property*, where the Public may fairly be conceived as an Individual.

If the Lawyers had not jumbled *Res Publicae* with *Communes*, as We have lately seen, and had been contented to have distinguished the *Res Vniversitatis* by the Title of *Res Publicae*, they would have written more pertinently.

VII. RES SINGVLORVM.

This is a Division very well understood. And, as private Property in the Roman Law is subdivided also, let us see what those Distinctions mean. The principal One stands thus:



These

PROPERTY.

1. RES CORPORALES.

These may be called *Res Tangibiles*, for they are always defined, in the Law, by the Touch, sc. *Quae sua natura tangi possunt*¹. Such as *Vestis, Fundus, Aurum*.

² Fest. v.
POSSESSIO.
Add Cicero
and Quinti-
lian quoted
below.

*Non enim Possessio est, nisi in iis rebus quae tangi possunt*².

But this is an inadequate Way of considering them. Whatever affects our Senses, in any degree, may be called *Res Corporalis*, whereas those Immaterial things, which consist in Abstraction, which are not handled, heard or seen, but conceived, as *Hereditas, Ususfructus, Obligatio*, etc. are called *Res Incorporales*³.

2. RES INCORPORALES.

*Vnum earum rerum, quae sunt, alterum earum, quae intelliguntur. Esse ea dico, quae cerni tangive possunt, ut fundum, aedes — Non esse, rursus ea dico, quae tangi demonstrarive non possunt, cerni tamen animo atque intelligi possunt, ut si usucapionem, si tutelam, — definias, quarum rerum nullum subest quasi corpus*⁴.

⁴ Cic. Topic.

5.

⁵ Quintilian.
I. 4.

So the Grammarians of old distinguished between *Vocabulum et Appellationem*⁵:

Fuerunt qui ipsum adhuc Vocabulum ab Appellatione diducerent, ut esset Vocabulum, Corpus visu tactuque manifestum, Domus, Lectus. Appellatio, cui vel alterum deest, vel utrumque, Ventus, Coelum, Deus, Virtus.

⁶ Jul. 17.

To which Passage may be added that of Suetonius:⁶

Nihil esse Rempublicam, Appellationem modo, sine Corpore.

We observed, that They are such as are apprehended by Reflection, not Sense; and consist in *Jure*, not *Corpore*.

⁷ D. 50. 16.
119.

*Hereditas — Juris nomen est, sicuti Bonorum Possessio*⁷.

⁸ D. 44. 2. 7.
pr.

*Nec interest utrum in Corpore hoc quaeratur, an in Quantitate, vel in Jure*⁸.

Nor is the Division at all affected by this Consideration, viz. That We are ultimately referred to, or That We must necessarily conclude, in, *Res Corporales*, even when We consider *Incorporales*; as Inheritance cannot be conceived without some Substance to inherit: (though *Papinian* writes,

⁹ D. 5. 3. 50.
pr.

*Hereditas sine ullo corpore Juris intellectum habet*⁹.)

Nor a Bond or Obligation without something due. For surely the Difference between the Right and the Substance is plain and perspicuous: I can distinguish between *Hereditatem*, and *Res Hereditarias*, though *Seneca*¹⁰ could not:

¹⁰ VI. de Be-
nef. 5.

ICTorum istae acutae ineptiae sunt, qui hereditatem negant usucapi, posse, sed ea quae in hereditate sunt: tanquam quidquam aliud sit Hereditas, quam ea quae in Hereditate sunt!

Yes!

Yes! just as much Difference, as between *Donationem* and the *Argentum donatum*: between the Benefit [*Beneficium*] We do to a poor Man in conferring a Gratiuity, and the material elementary Sixpences, which We use upon the occasion.

3. RES MOBILES.

The Distinction of Things into *Mobiles* and *Immobiles* concerns the *Res Corporales* alone. The Roman Law considers *Mobiles* of two Sorts: Either *Movementia* or *Mobilia*. And, what is very extraordinary, Such as have the principle of Motion within themselves, as Animals, their Lawyers call by the latter Name, and Such as require a Power from without, are called *Movementia*², when One would reasonably expect the Contrary. ² Not. ad D. But neither is this Distinction constantly observed; nor am I satisfied ^{50. 16. 93.} of the Truth of the Observation itself. Take it therefore thus:

1. *Res Mobiles* are such as can *integre, salve et commode* be removed from place to place, as Money, Goods, Furniture, Ships, *etc.*
2. Such therefore may fairly be understood, as have this *Loco-motive* Faculty within themselves, as Animals.
3. Such Things, as adhere to *Res Immobiles*, yet adhere not *perpetuitatis causa*, but are of a temporary consideration, as Scaffolding, *etc.*

*Labeo generaliter scribit, ea quae perpetui usus causa in aedificiis sunt, aedificiū esse, quae vero ad praesens, non esse aedificiū; utpote Fistulae, temporis quidem causa posita, non sunt aedium: veruntamen si perpetuo fuerint posita, aedium sunt*³.

³ D. 19. 1.

And therefore it is to be sought, *Quo animo, Qua destinatione* such Things are found there. And for this end several Laws in that Title are proper to be consulted.

By this We may learn what they understood by

4. RES IMMOBILES.

viz. 1. Such as cannot be removed at all, or not without Destruction, *sc. Aedes, Res Soli, Metallo-fodinae.*

2. Such Moveables, as are fixed to the Free-hold, *perpetui usus causa*, and are therefore justly deemed parts of it. For what is Law for the whole, is Law also for part of it⁴.

⁴ D. 6. 1. 76.

Here We see that *Perpetui usus causa* is the Test We are to judge by. ^{Pr.} And therefore, if Things are sometimes disjoyned, and yet are meant to be joyned again, That shall be construed Perpetuity.

*Straturam [alii Structuram] loci alicujus ex tabulis factis, quae aestate tollerentur, et hyeme ponerentur, aedium esse ait Labeo: quoniam perpetui usus paratae essent, neque ad rem pertinere quod interim tollerentur*⁵.

⁵ D. 50. 16.

*Tegulae, quae nondum aedificiis impositae sunt, quamvis tegendi gratia allatae sunt, in rutis et caesis habentur: Aliud juris est in his quae detractae sunt, ut reponerentur: aedibus enim accedunt*⁶.

^{242. 4.}

⁶ D. 19. 1.

I have another Distinction to make, and that in pursuance of a Division, which *Ulpian* makes in a Law lately cited², where He classeth Things into *Corpora*, *Quantitates*, and *Jura*. And thus We come at what the Lawyers mean by

² See Nerii II. Analect. 20. Heinecc. ad Instit. pagg. 140 and 259.

5. RES FVNGIBILES¹.

And this is to be thus understood. If I treat for a Slave, a House, or a Horse; or if a Slave, *etc.* be left me by Will, that *Specific* Slave or House is due to me, *quia Functionem in suo Corpore recipiunt*. And if I am Creditor for one of these, my Debtor cannot force upon me one of another Sort, though a better in value. But such Things as consist in Number, Weight or Measure, *non specificam Functionem, sed generalem recipiunt*. A Legacy of Twenty Pounds is as lawfully paid in one kind of Coin (provided it be legal) as in another. And if I borrow a Measure of Wheat, I may pay it in an equal *Quantity* (of equal Goodness); *i. e.* I shall not be compelled to pay the identical Grains: For indeed they are supposed to be borrowed for Consumption. And this is the Reason, why with the modern Lawyers *Res quae consistunt pondere, numero et mensura* are called RES FVNGIBILES. *Quia una alterius vice fungitur*.

The Distribution of Things into such as are *Fungibiles*, and such as are not so, constitutes one Distinction (for there are several) between *Mutuum* and *Commodatum*: the Former of which may be restored in *Genere*, the Other must in *Specie*.

² See Harpocrat. v. ΑΦΑΝΗΣ ΟΥΣΙΑ.

I might here add another Distinction of the Ancients, the Athenians for instance, who divided their Goods or Substance into Οὐσίαν Αφανῆν and Φανεράν. By the Former, They understood nearly what We now call the *Personal*, and by the Other, what We call the *Real*, Estate³.

³ IX. Observ.

30.

Maussacus upon the place accommodates this Distinction to that of the Romans, into *Res Mobiles* and *Immobiles*. What was meant in the Roman Law by RES MORTVAE, may be seen in *Cujacius*³.

WE HAVE seen in some measure what was the *Origin* of Property: We have also attended to the Distinction, which the Lawyers have laid out, of *Things* to be possessed or enjoyed. Let us now in its Turn consider briefly the various *Modes* or *Sorts* of Enjoyment.

Property is an Exclusive Right. That is said to be really and emphatically MINE, when I have a Right, a Power, or Faculty of denying Others the Use and Fruit of it.

⁴ See Bynkershoek. Opusc. de Dominio Maris.

*Dominium*⁴ est jus ac Potestas quocunque modo rebus utendi, ita ut aliis earundem usu intercludatur.

So that, strictly speaking, *Dominium* is the Attribute of the Proprietor, and *Proprietas* of the Thing so appropriated. For those Things which are subject to any one's Dominion, are said to be *istius hominis propriae*. So

⁵ Hor. 2. Sat. II. 129.

*Propriae telluris Herum i. e. Dominum*⁵.

If I was to define Dominion or Property any other way, it would not be a compleat Definition. For

For instance, If I was to describe the Right by the Enjoyment, *fructuum perceptione*, my Description would be defective ; because the *Vsufuctuary* or Tenant may enjoy, but the Right or *Dominium* is in the Landlord.

Some have founded the Nature of Dominion in the Right or Power of Disposing of it. Which is false : because Minors, *etc.* cannot dispose of their Estate, and yet in that Estate are the proper Owners or *Domini*.

Non est Argumentum, ideo aliquid Tuum non esse, quia vendere non potes, quia consumere, quia mutare in deterius aut melius ⁶.

⁶ Senec. VII. de Benef. 12.

Last of all I could not describe it by Possession alone. For Possession is one thing, and Property, or Dominion, another⁷. Possession is properly the Legal Attendant upon *Dominium*. It is something like *Exerting the Act* of Property, for by it We affectually *exclude* the Seisin of Others : and when We come to claim our own from the Occupancy of Those, whom We conceive to detain or *possess* our Property unlawfully, We mean to recover our Right of *exerting* that Act I mentioned. Moreover Dominion has its *Foundation* only in natural or corporal Possession.

⁷ D. 41. 2. 50. l. 52. pr. eod. Not. ad l. 12. eod.

Dominium ex naturali Possessione coepisse Nerva filius ait ⁸.

⁸ D. 41. 2. 1.

So that the Greek Writers, and others, use these two Ideas promiscuously,

Δέξῃ δὲ μὴ δεῖν ταῦτα τῷ ΚΕΚΤΗΜΕΝΩ ⁹.*

⁹ Aristoph. Plut. init.

Where *Κεκτημένος* is used *de persona Herili*, the Master, Lord or Owner of the Slave.

And therefore with the Ancients, *Κρατεῖν, ἔχειν, Tenere, Habere*, (all which amount to no more than mere Possession) came to stand in the place of Property or *Dominium*.

Thus the *summum Imperium* of *Jupiter* was described,

τῷ γὰρ ΚΡΑΤΟΣ ἐστὶ μέγιστον ¹.†

¹ Homer. passim.

O quae beatam, Diva, tenes Cyprum ².

² Hor. 3. Od. XXVI. 9.

As *Sappho* has it,

Κύπρου Πάφου τ' ΕΧΟΥΣΑ πάντα κληῖρον. ||

Urbem Romam a principio Reges habuere ³.

³ Tacit. I. Annal. init.

As the Philosopher said, *Habeo Laidem, non Habeo a Laide*. *ἔχω ἀλλ' ἔκ ἔχομαι*. And *Seneca* somewhere, it is said, *Avaros non divitias habere, sed a divitiis haberi*.

So *Horace* has *Possessor* for *Dominus* :

Valeat Possessor oportet ⁴.

⁴ 1 Epist. II.

There is a Natural Possession, and a Civil Possession. Natural, or Corporal, Possession is, *quae corpore solo consistit, non jure Dominii* : Civil, That, *quae apprehenditur et possidetur ex justa causa acquirendi Dominii ab eo qui se Dominum credit*.

* Videatur autem haec non facere Possessori.

† Ejus enim imperium est maximum.

|| Quae Cypri Paphique tenet omnem ditienem.

Thus

Thus We come by the Distinction between the *Bonae Fidei Possessor*, and the *Malae*. The One is He who holds a Thing, and *thinks* He is the Legal Proprietor: the Other, who holds it, and *knows* He is not. And there appears to be something in this Distinction,

1. *Possidere titulo nullo,*
2. *Possidere titulo justo, sed non vero.*
3. *Possidere titulo justo et vero simul.*

For the true Idea of Legal Possession is, as I was saying, *Possidere cum animo opinioneque Domini*. And as that Persuasion may be either a just Conception, or a mistaken one, there is reason to insinuate between Those who possess with no Title at all, and Those who possess with the best Title, Such as the Law calls *Bonae Fidei Possessores, qui rem possident non suam, quam tamen suam esse putant*.

It may be asked, what is meant by some Divisions of *Dominium*: as for instance,

Dominium Plenum et Minus Plenum.

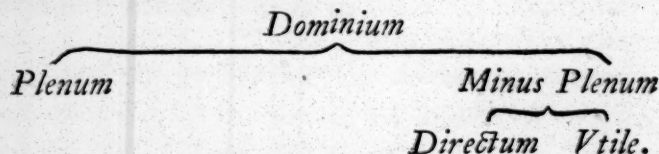
Dominium Directum et Vtile.

Dominium Quiritarium et Bonitarium.

*Dominium Eminens et Vulgare*¹.

¹ Above, pag. 463.

That may be called *Dominium Directum*, which is the Property, without the Use; or the Right of the Land-lord; *Dominium Vtile*, the Use without the Property; or the Right of the Tenant. And where both concur, *Dominium Plenum*: thus,



² Above, pag. 93.

³ D. 13. 7. 16. 2.

⁴ Vlpian. Fragm. I. 16. XIX. 20.

⁵ J. 1. 5. 3.

⁶ II. de R. R. 10.

This Distinction is not of the elder Law, and is condemned by many Civilians. It was first applied here with an Eye to that Distinction, which prevails in Civil *Actions*, and classes them into *Directas et Vitiles*². The former of which did *competere Domino Fundi*, the Other *Emphyteutae et Superficiario*³. When the Ancients distinguished, the One was *Dominium*, the Other, *Jus Dominio proximum*; or something like it.

Dominium Quiritarium and *Bonitarium*⁴ stand distinguished like Civil and Natural. And *Theophilus*⁵ accordingly calls the former *ἐννομεον* * the other *φυσικόν*.† And not unlike it *Varro*, as We shall see immediately.

The Methods of Acquisition by Civil Law, the *Modi acquirendi Civiles*, are many, and these serve to constitute the *Dominium Quiritarium*; which was the fullest and compleatest manner, in which a Thing could be held, and was applicable to None, but a Roman Citizen. *Varro*⁶ mentions six of these; Others have added 'more:

* *Legitimum.*

† *Naturale.*

Sex enim fere res in Emptionibus Dominium legitimum perficiunt. Hereditas, Mancipatio, in Jure Cessio, Usucapio, sub Corona Emptio, Auctio.

But this Distinction was taken away by Justinian⁷, and consequently deserves but little of our Notice.

However, as the *Dominium Bonitarium* is said to be that kind of Possession, by which Things are said to be in *Bonis*, it may not be amiss for us to reserve so much of the Distinction, as shall serve to discriminate between Legal Title, and Actual Possession, which Lawyers hold when They maintain, *Aliud est esse in Bonis, Aliud in Dominio*.

In Bonis nostris computari sciendum est, non solum quae Dominii nostri sunt, sed et si bona fide a nobis possideantur, vel superficiaria sint. Aequè Bonis adnumerabitur etiam siquid est in Actionibus, Petitionibus, Persecutionibus. Nam et haec in Bonis esse videntur⁸.

And this conducts us to the true meaning of PATRIMONIUM. Which in the Law here subjoined stands much like *Dominium*, opposed to *Bona*, or *Nomina*, to Debts, Bonds and Obligations :

*Cum Pupillus a Tutore stipulatur Rem salvam fore, non solum quae in Patrimonio habet, sed etiam quae in Nominibus sunt, ea stipulatione videntur contineri*⁹.

After having inquired into the Notion of Property, Seizin or Possession, and viewed it in most of the Lights it was necessary, I engaged myself next to consider how it passes from one hand to another. The most important Ways are those of EXCHANGE and SURVIVORSHIP. The Former comprehends the Rules of Commerce, and of that particular Sort of Contract, which is known by the Name of *Bargain and Sale*. The Other concerns the *Bona Defunctorum*, which pass to a Successor, either by the express Will of the last Proprietor, or by the Act and Disposition of Law.

It is to be observed that Property (or Possession at least) the *Rei HABENTIA*, is transferred by many Ways besides these mentioned. As by *Gift*, by *Loan*, by *Hire*, by *Trust*, by *Lease*, by *Pledge* or *Pawn*. All which have their Rules and Considerations in the Civil Law, yet am I not led to prosecute in the original Plan of these Papers ; which was of a less extensive Nature, and rather confined to the great and interesting Heads of Human Life in general.

AFTER PROPERTY was introduced, what was so obvious as the Exchange of it? For

*Vnusquisque secundum necessitatem temporum ac rerum, utilibus inutilia permutabat, quando plerumque evenit, ut quod alteri superest, alteri desit*¹.

It was natural, that People very soon should have a Superfluity of one kind of Goods, and stand in need of others, which were of equal Convenience. I say this was natural, whether We consider their Live-Stock, or their Manufacture. In the one Case, *Similis Similem gignebat* ; and in the

⁷ C. Lib. VII. Tit. XXV. DE NVDO IVRE QVIRITIVM TOLLENDO.

⁸ D. 50. 16. 49. Add. 41. 1. 52.

⁹ D. 46. 6. 9.

¹ D. 18. 1. 1.

the other, their Art and their Labour being generally confined, their Emoluments must be nearly of a Sort.

And This was not the case of Individuals only, but of whole People and Nations. And that followed from their Situation and Temperature:

*Hic Segetes, illic veniunt felicius Vvae :
Arborei foetus alibi, atque injussa virescunt
Gramina. Nonne vides, croceos ut Tmolus odores,
India mittit ebur, molles sua tura Sabaei?
At Chalybes nudi ferrum, viroscumque Pontus
Castorea, Eliadum palmas Epirus equarum¹?*

¹ Virg. I.
Georg. 54.
² Odyss. A.
182.

According to what We read in *Homer*²,

Νῦν δ' ὦδε ζῶν νηὶ κατήλυθον ἡδ' ἐτάροισι,
Πλέων ἐπὶ οἶνοπα πόντον ἐπ' ἀλλοθρόους ἀνθρώπους,

ΕΣ ΤΕΜΕΣΗΝ ΜΕΤΑ ΧΑΛΚΟΝ, ΑΓΩ Δ' ΑΙΘΩΝΑ ΣΙΔΗΡΟΝ.*

And this was the Foundation of what is called TRADE, TRAFFIC, or COMMERCE. It could not well be otherwise upon the System that was established :

³ Aristot. I.
Polit. 6.

Μεταβλητικὴ — ἀρξάμενη τὸ μὲν πρῶτον ΕΚ ΤΟΥ ΚΑΤΑ ΦΥΣΙΝ,
τῷ τὰ μὲν πλείω, τὰ δ' ἐλάττω τῶν ἰκανῶν ἔχειν τὰς ἀνθρώπους³.†

Now the Considerations which attend these Exchanges, is the Article I am engaged in.

It is plain, if We search into the Original, and survey the natural Course of these Proceedings, that *Caius* (for instance) possessed of Goods or Substance, is possessed of a Right, which no Person or Power ought (ordinarily) to take from him. And I will suppose *Titius* possessed of a certain Quantity of another kind of Goods in the same manner. As long therefore as these Goods are sufficient to each Owner, so long Traffic will be unknown and unheard of. Nay longer still: For if *Caius* should be in want of some other kind of Substance, than what He is possessed of, and *Titius* should be Master of such Substance, yet still We are got no farther. For though *Caius* should want to exchange his Goods, yet, upon my Hypothesis, *Titius* is not bound to part with his. *Titius*, with all his Wants may not want exactly to have, what *Caius* might want to get rid of.

Καὶ γὰρ ὅταν μὴ χρειᾶν ἔχωσιν ἀλλήλων, ΟΥΚ ΑΛΛΑΤΤΟΝΤΑΙ, ἔδὲ κοινοῦσιν ἀλλήλοις. ἢ ὅταν ὁ μὲν δεῖται θατέρου, ἄτερος δὲ θατέρου χρειᾶν ἔκ ἔχῃ. καὶ τότε γὰρ ὁμοίως ἀκοινωνήτοί εἰσιν. ὥσπερ τὸναντίον, ὅταν ὁ μὲν ἔχει αὐτὸς δεῖται τις, αὐτὸς δὲ χρήζει ὧν ἐκεῖνος δεῖναι δυνατός⁴†

⁴ Andronic.
Rhod. Para-
phrase. Nico-
mach. V. 6.

* Nunc vero huc cum navi veni atque sociis,
Navigans super nigrum pontum ad alienae-linguae homines,
Ad Temesēn propter aes, fero autem splendidum ferrum.

† Permutatio — orta est primum ab eo quod Natura fit, quia partim rerum vitae accommodatarum plus homines habent, partem minus.

‡ Si enim alter altero opus non habeat, non commutant inter se, nec communicant. Aut si alter quidem altero, altero autem opus non habet alter, ne sic quidem similiter communicant. Quod contra tum demum procedit, cum quod alter habet eo eget alter, alter autem rursus eget, quod dare potest alter.

Therefore

Therefore as mutual Consent is essential to this Communication, and necessary to set it forwards, the Affair of Exchange, of Buying and Selling, of Trade and Commerce, assumes the perfect nature of a CONTRACT, and is to be exerted and managed by the Rules of Contract accordingly.

In order therefore to sollicite this Consent, when the Wants of *Caius* and *Titius* were not reciprocal (though other Reasons contributed to the Invention) Mankind struck out the Thought of *PRECIVM*, a general Standard, the Measure and Value of all the Goods in the World; which therefore could transmute itself into the Shape of all the Goods in the World. As long therefore as People have Wants, and are not supplied with all manner of Necessaries, so long by the Mediation of this Catholicon, this equal Representative, the Business of Traffic or Communication will be kept up. For though *Caius* could not come at the Goods of *Titius* in the ordinary Way of Exchange, because He had not the specific Goods which *Titius* wanted in Return; yet *Caius*, by turning his Goods into Money, or Price, at another Market, became now possessed (at least in Representation or Equivalence) of those Goods which *Titius* might possibly stand in need of. And This is that *golden Chain*, which links together the Interests, and supplies the Wants, of all Mankind in general. It is thus the Lawyers write,

Quia non semper, nec facile, concurrebat, ut, cum Tu haberes, quod Ego desiderarem, invicem haberem quod Tu accipere velles, electa Materia est, cujus publica ac perpetua Aestimatio difficultatibus Permutationum aequalitate quantitatis subveniret.

⁵ D. 18. 1. 17

Διὰ τὸτο ἀνάγκη εἶναι τι ἐν μέτρον κοινὸν ἀπάντων, ὃ πάντα δυνάμεθα μετρεῖν, καὶ δι' ὃ τὴν ἀξίαν ἐκάστου γινώσκουμεν. ἔστι δὲ φύσει μὲν, καὶ ἀληθείᾳ, ἡ χρεῖα μέτρον ἀπάντων. καθίσσον γὰρ τις δεῖται τινός, κατὰ τοσούτον βέλεται αὐτῷ κοινωνεῖν. εἰ γὰρ μὴ δεῖτο τῶν ἐτέρων, ἢ μὴ ὥσπερ ἄλλος τῶν ἐκείνων, ἀλλὰ ἑλάττω, ἢ ἕως οὗ ποτὲ ἀλλαγῇ. δέικνεν ὅτι τὰ ἑαυτοῦ δίδωσι, καὶ λαμβάνει τὰ τῶν ἄλλων. ἡ μὲν ἔν χρεῖα φύσει καὶ ἀληθείᾳ μέτρον ἐστὶ τῶν πραγμάτων. αὕτη γὰρ πάντας εἰς ἓν συνάγει. νόμος δὲ, καὶ κατὰ συνθήκην, τὸ νόμισμα καὶ διὰ τὸτο καὶ νόμισμα καλεῖται, ὅτι ἢ ἐστὶ φύσει, ἀλλὰ παρ' ἡμῶν ἐτέθη, καὶ ἐφ' ἡμῖν ἐστὶ μεταβαλεῖν αὐτὸ, καὶ ποιῆσαι ἄχρηστον. ἔστι τοίνυν καὶ τὸ νόμισμα μέτρον, ὡς εἴρηται, τῆς τῶν πραγμάτων ἀξίας, καὶ αὐτὸ μὲν ἢ ἐστὶ χρεῖα δι' ἑαυτῆς, ἐστὶ δὲ ὥσπερ ὑπάλλαγμα τῆς χρείας. Διὰ τούτων τοίνυν τῶν μετρῶν γνωστῆσθαι ἐκάστου τῆς ἀξίας τῶν ἔργων, ἢ ἀλλαγῇ ἰσὶ ῥῶπον ἔσθαι, καὶ κατὰ τὸ ἀνάλογον.*

⁶ Andronic. Rhod. l. c.

* Oportet igitur communem aliquam mensuram esse, qua metiri cuncta possimus, rerumque omnium cognoscere precia. Haec autem proprie quidem et revera est Indigentia. Quantum enim quis aliquo opus habet, tantum ejus particeps vult fieri. Nisi enim iis quae alterius sunt opus quis habeat, aut minus quam alius quae sunt ipsius, nulla erit Commutatio. Cum vero opus habeat, dat sua, accipitque aliena. Proprie ergo et revera rerum omnium mensura est Indigentia: haec enim in unum cogit omnes. Ex Lege vero et instituto est Nummus, ideoque etiam Νόμισμα vocatur. Quia namque per se non est tale, sed ex constitutione nostra: ideoque in potestate nostra est, mutare eum et inutilem efficere. Est ergo Nummus quoque, quemadmodum dictum est, precii cujusque rei mensura. Quo tamen nemo per se opus habet, sed quasi in locum Indigentiae successit. Cum hac ergo, quasi mensura, singula rerum investigemus precia, aequalis, et, ut postulat proportio, fiet Commutatio.

If I may be allowed to set my Face against a great Master, there are some Things here I would dispute. Indigence is not the natural Standard in the Exchange of Property. Nor is Money, the Substitute of That, but of something else. Though these two Propositions are both laid down, with Sufficiency enough, in this Quotation. The Wants of Mankind are certainly the Basis of this Contract, but then the natural Rule of adjusting it is not *Χρεία* itself, but *Tantumdem*. Now *Tantumdem*, or *Quanti constat*, is *Precium*. Which is two-fold, viz. a *Real Tantumdem*, or an Exchange of Quantity for Quantity, and a *Civil* or imaginary one, set up by general Consent, consisting of that *Elixir Proprietatis* before-mentioned, that *Norma Lesbica*, which shapes itself to every thing. *Precium* therefore, to speak more accurately and precisely than I did above, is a general Term for Equivalence, that just Value which turns up, upon a proper Comparison of two Things in Question: Either So much for So much, Which is called *PRECIVM VVLGARE*; Or else this Mediatorial Discovery of Money, which being but of little use in itself, *quo nemo per se opus habet*, but a common Standard to measure or appreciate other Things by, has got the *emphatical* Name of that which is its peculiar Use and Employment, viz. *Price*, and is therefore called *PRECIVM EMINENS*, or Price by Way of Eminence. Now this differs a good deal from the System of that Author I just now made use of, as any one will see by the Comparison. Nor can I possibly discover what should lead him to imagine, that Indigence had a less share in the one Consideration than in the other.

Thus much for the Summary, and now for the Procefs.

What We first set out with was the Simplicity of the very early Ages, and the State and Extent of their Traffic, which was nothing more than Permutation.

Thus it stood, with the Greeks at least, as far down as the Trojan War. For We read in *Homer*, that when the Wine-Fleet came from Lemnus,

Ενθεν ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,
 Ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἰθωνι σιδηρῷ,
 Ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῶσι βόεσσι,
 Ἄλλοι δ' ἀνδραπόδεσσιν³ *.

¹ Iliad H. 472.

⁴ D. 18. 1. 1.

⁵ J. 3. 24. 2.

⁶ XXXIII. 1.

⁷ v. APNY-

MENOS.

⁸ ad Virg. III.

Georg. 306.

⁹ IX. 6.

¹ Scacch. My-

rothec.

Pfeiffer. An-

tiq. Graec. II.

38.

This Circumstance is mentioned, and this noted Passage produced, by *Paulus*⁴, by the Emperor⁵, by *Pliny*⁶, by *Etymol. M.*⁷, *Servius*⁸ and *Pollux*⁹: And this Sense is given of the Words by *Eustathius* and others: though it is denied by some, that this Passage proves the Point, for which *Paulus* produced it¹.

* Illinc vinum emebant Achiivi comantes caput,
 Alii quidem aere, alii autem ferro nigro,
 Alii pellibus, alii ipsis bovis,
 Alii autem mancipiis.

Again :

Again:

Εὐρύκλει' Ωπ[Ⓢ] θυγάτηρ Πεισηνορίδαο,
τὴν πόλιν Λαέρτης, ΠΡΙΑΤΟ ΚΤΕΑΤΕΣΣΙΝ ΕΟΙΣΙΝ,
Πρωθήτην ἐτ' ἔχσαν, εἰκοσάβοια δ' ἔδωκεν[†].

² Odyss. A.
429.

Σῆτον δὲ σφιν ἔνειμε Μεσαύλι[Ⓢ], ὃν ῥα συζῶτης
αὐτὸς κτήσατο οἷ[Ⓢ] ἀποικομένοιο ἀνακλ[Ⓢ],
Νίσφιν δεσποίνης καὶ Λαέρταο γέρον[Ⓢ].

Πὰρ δ' ἄρα μιν Ταφίων ΠΡΙΑΤΟ ΚΤΕΑΤΕΣΣΙΝ ΕΟΙΣΙΝ[‡].

³ Odyss. E.
449.

Νῦν δ' ὦδε ζῶν νῆι κατήλυθον ἡδ' ἐτάροισι,
Πλέων ἐπὶ οἶνοπα πόντον, ἐπ' ἄλλοθροος ἀνθρώπων,

Ες Τεμέσην μετὰ ΧΑΛΚΟΝ, ἄγω δ' αἶθωνα ΣΙΔΗΡΟΝ[§].

⁴ Odyss. A.
182.

Ω φίλε, τίς γάρ σε ΠΡΙΑΤΟ ΚΤΕΑΤΕΣΣΙΝ ΕΟΙΣΙΝ^{||};

⁵ Odyss. E.
115.

Επρίαυτο ἀνιδόνη βῆς· ΑΡΓΥΡΟΥ ΓΑΡ ΟΥΚ ΗΝ ΠΩ ΤΟΤΕ, ΟΥΔΕ
ΧΡΥΣΟΥ ΝΟΜΙΣΜΑ· κατὰ ΤΡΟΠΟΝ δὲ ἐπὶ ΤΟΝ ΑΡΧΑΙΟΝ ἀν-
τεδίδωσαν βῆς, καὶ ἀνδράποδα, καὶ ἀργὸν τὸν ἀργυρὸν καὶ τὸν χρυσόν[†].

⁶ Pausan. III.
Lacón. p. m.
93.

*Proximi ob usum Commerciorum aurum et argentum in precio habent,
formasque quasdam nostrae pecuniae agnoscunt atque eligunt: inte-
riores simplicius et antiquius permutatione mercium utuntur[‡].*

⁷ Tacit. de
morib. Ger-
man. c. 5.

— καθάπερ ΕΤΙ πολλὰ ποιεῖ καὶ τῶν βαρβαρικῶν ἔθνων κατὰ τὴν ἀλ-
λαγὴν. ΑΥΤΑ ΓΑΡ ΤΑ ΧΡΗΣΙΜΑ ΠΡΟΣ ΑΥΤΑ ΚΑΤΑΛΛΑΤ-
ΤΟΝΤΑΙ, ἐπιπλέον δὲ ἔθεν, ὅον, οἶνον πρὸς σῆτον διδόντες, καὶ λαμβά-
νοντες[§] * * *.

⁸ Aristot. I.
Polit. 6.

Thus *Mutare* signifies the Contract of Bargain and Sale, even after Money was invented:

Permutare precio noluit, aliarve merce⁹.

⁹ Plin. IX. 55.

Cetera vel reponantur, vel aere mutantur¹.

¹ Colomel.
VIII. 5.

Vt sex millibus denariis singula vasa permutarentur².

² Valer. Max.
VII. 6.

Nam saepenumero et vinum, et olus, et pomum precio mutavi³.

³ Apul. Apo-
log. I.

† *Euryclea Opis filia Pisenoridae,
Quam olim Laertes emerat facultatibus suis,
Impubem adhuc, precium viginti boum dedit.*

* *Panem autem ipsis distribuit Mesaulius, quem subulcus,
Ipse comparaverat solus, absente domino,
Scorsim a Domina, et Laerte sene:
Ipsum nempe a Taphiis emit possessionibus suis.*

§ *Nunc vero huc cum navi veni, atque sociis,
Navigans super nigrum pontum ad alienae linguae homines,
Ad Temesen propter aes: fero autem splendidum ferrum.*

|| *O amice, quis te emit rebus suis?*

† *Emebant boves commutantes: argenti enim et auri numisma tunc non erat. More autem antiquo commutarunt boves, et mancipia, et rude argentum et aurum.*

** *Quemadmodum adhuc multae faciunt barbararum gentium in permutatione: ipsas enim res utiles vitae inter se commutant, neu ultra quicquam, seu vinum pro frumento dantes et accipientes.*

⁴ Ovid. I. Trist.
II. 76.

Latum mutandis mercibus aequor aro⁴.

⁵ Aufon. II.
Epist. 23.

*Et mercium quoquo foro venalium
Mutator ad Graecam fidem⁵.*

⁶ Sallust. Ju-
gurth. §. 21.

*Neque materia in agris, neque ab Hispanis emendi aut mutandi
copia erat⁶.*

⁷ Virg. III.
Georg. 306.

— *quamvis Milesia magno
Vellera mutantur⁷.*

Upon which Place *Servius* writes :

*Ingenti precio comparentur. Nam apud majores omne mercimonium in
permutatione constabat : quod et Caius Homericus confirmat exemplo.*

⁸ Jul. Poll. IX.

Of Permutation see more in the Authors cited in the Margin⁸.

⁶ §. 73.

J. Bapt. Pii

Annotat. Cap.

152. apud

Gruter.

Mascovius de

vestigiis secta-

rum in J. C.

C. 9. §. 10.

Parmigiano

sopra le Me-

daglie. I. 1.

Hofius de Re

Nummaria

L. 1. C. 6.

Scacch. My-

rothec. II. 2.

p. 296.

⁹ III. p. m.

155.

¹ c. 25.

² II. 1.

³ V. 17.

⁴ VI. in Apol-

lon. 2.

⁵ Epist. III.

pag. 205.

⁶ Justin III. 2.

fin. Add.

Porphy. de

Abstin. IV. 3.

That Permutation was the Practice of the *Lusitani*, We learn from *Strabo*⁹, of the old Inhabitants of Britain, from *Solinus*¹, of many Nations besides, from *Pomponius Mela*², *Diodorus Siculus*³, and *Philostratus*⁴. The most remarkable, because one of the most recent, Instance, is that of the *Rugiani*, who were thus circumstanced, as low as the Year MCXI. For which I find one *Helmoldus Presb.* quoted, I suppose in his Chronicle of *Sclavonia* :

*Porro apud Rugianos non habetur Moneta, nec est in comparandis rebus
Consuetudo Numorum : sed quicquid in foro mercari volueris, panno
lineo comparabis. Aurum et Argentum, quod forte per rapinas et
captiones hominum undequaque adepti sunt, aut uxorem suarum cul-
tibus impendunt, aut in aerarium Dei sui conferunt.*

However *Busbequius*⁵ brings it down to his own Experience, in the *Mingrelians*, a People of Asia.

This Simplicity of Commerce *Lycurgus* revived in his People, as being more conformable to the Constitution of his Government.

*Emi singula, non pecunia, sed compensatione mercium jussit. Auri
Argentique usum, velut omnium scelerum materiem sustulit⁶.*

And I would add, that Barter or Truck, (*viz.* Permutation) if it can be commodiously conducted, was not extinguished by the Introduction of the general Standard, which was an Invention to ease the Difficulties of it only. The great Commerce between Nation and Nation still speaks, in general, the Language of *Mentes* lately produced⁷ :

*Freighted with Iron from my native Land,
I steer my Voyage to the Brutian Strand ;
To gain by Commerce, for the labour'd Mass,
A just Proportion of Refulgent Brass,*

POPE.

There

⁷ pag. 480.
483.

There is a pretty Dialogue in *Aristophanes*^s between an Athenian and ^a Acharn. v. Boeotian. *Will you have Money or Goods?* says the Former. *By all means,*⁸⁹⁷ replies the Other, *some Produce of Athens, that is not to be had in Boeotia.* Why then, says the Athenian, *I'll pack you up an Informer.*

A. Φέρε, πόσα λέγεις,
 Η Φορτί' ἕτερ' ἐνθενδε κεῖσ' ἄξεις ἰών;
 B. Ο, τι γ' εἰς Αῑθάναις, ἐν Βοιωτοῖσιν δὲ μὴ.

A. Εγ' ᾔδω. τοῖνον συκοφάντην ἔξαγε.

And upon this general Principle of Permutation is explained the Mythology of *Metra*, in *Ovid*, who maintained an indigent Father, by what She acquired in letting out her Service; viz. Her Wages were paid in Effects:

*Saepe Pater Dominis Triopeïda vendit, at Illa
 Nunc Equæ, nunc Ales, modo Bos, modo Cervus abibat,
 Praebeatque avido non iusta alimenta Parenti.*

⁹ Ovid. VIII.
 Met. 872.

Quantum feliciore aevo, cum res ipsae permutabantur inter se, sicut et Trojanis temporibus factitatum Homero credi convenit. Ita enim, ut opinor, commercia victus gratia invecta, Alios coriis boum, alios ferro captivisque rebus mutasse tradit. Quamquam et ipse mirator auri aestimationes rerum ita fecit, ut centum-boum-arma aurea permutasse Glaucum diceret cum Diomedis armis-novem-boum. Ex qua consuetudine multa legum antiquarum pecore constat.

¹ Plin. XXIII.
 1.

From this Passage of *Pliny* two things offer themselves to our Observation.

(1.) That the Value of Gold was known even before *Homer's* Time.

That it made a Part of a Man's Riches, or Substance, is also plain from the same Author:

Η ἀφνειότεροι χρυσοῖο τε ἐσθῆτος τε.*

² Odyss. A.
 165.

And I can very easily suppose, that some Part of Mankind continued in the Simplicity of Permutation, while the more Improved had applied the commercial use of Gold and Silver. Which is pretty plain from the Passage of *Tacitus* cited above.

(2.) The second Observation I would raise from the Words of *Pliny*, is, That in the Roman Language and Constitution, there are visible Foot-steps of this ancient Custom.

Pliny says, in this Passage, that Mulets were not Pecuniary, but consisted in Goods and Cattle anciently: and the same is confirmed by *Festus*³, *Gellius*⁴, *Varro*⁵, and others.

I shall transcribe a curious Passage from *Plutarch*, in his Life of *Publicola*:

³ V. AESTIMATA.
 TA. MVLCTA.
 QVIBVS.
⁴ XI. 1.
⁵ IV. et V. de-
 L. I.
⁶ T. I. Ed.
 Bryan. pag.
 226.

* *Quam ditiores in auro et veste.*

O dē

Ο δὲ γραφεὶς [νόμος] κατὰ τῶν ἀπειθέων τοῖς ὑπάτοις. ἔχ' ἤτην ἑδοξε δημοσικὸς εἶναι, καὶ πρὸς τῶν πολλῶν μᾶλλον ἢ δυνατῶν γεγράφθαι. ζημίαν γὰρ ἀπειθείας ἔταξε βοῶν πέντε καὶ δυοῖν προβάτων ἀξίαν. ἦν δὲ τιμὴ μὲν προβατίη, ὅβολοι δέκα, βοὸς δὲ, ἑκατόν· ἔπω νομίσματι χρωμένων πολλῶ τότε Ῥωμαίων, ἀλλὰ προβατείαις καὶ κτηνοτροφίαις εὐθηνέντων. διὸ καὶ τὰς ἐσίας ἄχρι νῦν ἀπὸ τῶν προβάτων πεκέλια (ΠΕΚΟΤΝΙΑ doubtless, if there be any Faith in MSS, from Bodl. 1. and 2.) καλῶσι, καὶ τῶν νομισμάτων τοῖς παλαιστοτέτοις βέν ἐπεχάραττον, ἢ πρόβατον, ἢ σῦν. ἐτίθεντο δὲ καὶ παισὶν αὐτῶν, Σὺλλας, καὶ Βεβήλους, καὶ Καπραρίους, ὀνόματα, καὶ Πορκίους, κάπρας μὲν, τὰς αἴγας, πόρκας δὲ, τὰς χοίρας ὀνομάζοντες.†

This Law of Publicola was followed A. V. C. CCC. by another, called *Lex Ateria Tarpeia*, where we see the same Method of Mulcting:

Αὐτοὶ τὴν ἀξίαν ᾤρισαν, μέγιστον ἀποδείξαντες ὅρον ζημίας, δύο βόας καὶ τριάκοντα πρόβατα.⁷*

In Rusticatione vel antiquissima est Ratio pascendi, eademque quaestuosissima, propter quod nomina quoque Pecuniae et Peculii tracta videntur a pecore. Quoniam id solum Veteres possederunt, et adhuc apud quasdam gentes unum hoc usurpatur divitiarum genus.

Cetera Luxuriae nondum instrumenta vigeant:

Aut pecus, aut latam dives habebat humum.

Hinc etiam Locuples, hinc ipsa Pecunia dicta est.

Pecuniae nomine non solum numerata Pecunia, sed omnes Res tam Soli quam mobiles, et tam Corpora, quam Jura continentur.

So St. Austin², lately cited,

Totum quicquid Homines possident — Pecunia vocatur, Servus fit, Vas, Ager, Arbor, Pecus — Ideo Pecunia, quia Antiqui totum quod habebant, in pecoribus habebant.

³ XXIX. 31.

Thus Livy³ of the *Massyli*, a People of Africa,

Familiae aliquot cum mapalibus pecoribusque suis (ea Pecunia illis est) persecuti sunt Regem.

Pecunia ipsa a pecore appellabatur — Multatio quoque non nisi Ovium Boumque impendio dicebatur. — Servius Rex Ovium Boumque effigie primus aes signavit.

⁴ Plin. XVIII.

³ Add. D.

50. 16. 178.

C. 4. 18. 2. 1.

Nonius, V.

PECVNIOVS.

† Illa etiam [Lex] quam tulit adversus eos qui Coss. non parerent, nihilo fecius visa popularis est, atque in gratiam potius plebis quam principum lata. Siquidem mulctam ei qui dicto audiens non esset, quinque bobus dixit et duabus ovibus valentem. Ovis erat Precium x Oboli, Bovis c, quod infrequens esset id temporis nummi apud Romanos usus, sed pecudibus et armentis abundarent. Vnde facultates suas a pecudibus pecuniam [PECVNIAM rather] nominant: et vetustissimi Nummi bove vel ove fuerunt signati, filiisque suis Suillis, Bubulcis, Caprariis, Porciis nomina indebant: τὰς αἴγας, Capras, τοὺς χοίρας, Porcos vocantes.

* Mulctae modus ab illis praefinitus, ne sc. maxima mulcta duos boves et triginta oves excederet.

This

⁷ Dionys. Halic. X. 50.

See Koolius

ad L. Ateriam

Tarpeiam, apud

Otton.

Thef. J. R.

Tom. V.

Heinec. Hist.

J. C. L. I. c. 2.

§. 21.

⁸ Columel. I.

6. Praef.

⁹ Ovid. V.

Fast. 279.

¹ D. 50. 16.

122.

² Pag. 469.

This last Passage of *Pliny* seems to afford another reason, why Money came to be called *Pecunia*. (And that Question has been greatly debated by Scholars.) And indeed I do not know but it is the better reason of the two.

But I think that from the foregoing Reflections it will appear why Money came by the Greeks to be called *Χρήματα*, and by the Romans *Res*.

*Magna pars Tatio Rerum erat inter oves*⁶.

⁶ Propert. IV.

*Abgregare est ab Grege ducere: Adgregare, ad Gregem ducere: Se-gregare ex pluribus gregibus partes seducere. Vnde et Egregius dicitur e grege lectus. Quorum verborum frequens usus non mirum si ex pecoribus pendet, cum apud antiquos opes et patrimonia ex his praecipue confisterint, ut adhuc etiam Pecunias et Peculia dicimus*⁷.

¹. 30.

⁷ Festus V.

ABGREGARE.

The Riches of the Patriarchs in Scripture are said to consist in a great number of Cattle: Though *Abraham* also is said to be rich in Silver. That it was Commercial Silver, is plain from this Passage⁸, *Four Hundred Shekels of Silver, current Money with the Merchant*. I would have it remembered however, that a good Writer has observed, that the Hundred Nummi elsewhere mentioned⁹, in the *Targum*, stand *Centum Agni*, One hundred Lambs; as they do also in the Version of the LXX. There is something here worth regarding in the *Etym. M.*

⁸ Gen. XXIII.

16.

⁹ Gen.

XXXIII. 19.

¹ APNY-

MENOE.

Διὰ τῶν ἀρνῶν καὶ τῶν ἄλλων ζώων τὰς ἀμοιβὰς ἐποιεῖντο οἱ ἀρχαῖοι*.

However, in process of Time, this Method was found to be inconvenient, and a kind of public Standard was set up by general Consent, and distinguished by the Name of *Precium*. Thus Bartering became Buying and Selling. And thus is the Law to be understood².

² D. 18. 1. 1.

pr.

Origo emendi vendendique a permutationibus coepit. Olim enim non ita erat Nummus.

Non ita olim. It is not long ago, that Money was in use.

The Advantages of *Precium* above *Permutation* are very considerable: viz.

1. It being a general Standard, and applicable to all kinds of Goods, it was more commodious to ascertain a proper and determinate Value. The Adjusting a proper Equivalent before was often impracticable.
2. It was more easily transferred from place to place, than so many Goods to be exchanged.

Οὐ γὰρ εὐεξάνητον, says the Philosopher³, ἕκαστον τῶν κατὰ φύσιν ἀναλκαίων†.

* *Agnis et Animalibus aliis permutationes fecerunt Antiqui.*

† *Difficile erat ad portandum omne quod erat natura necessarium.*

3. A Merchant may have no want of my superfluous Goods, nor I of his; or put the case with *Paulus* and *Andronicus* cited above⁴, one Party only may want, but the Want not be reciprocal. I say, in such a Case the Circulation of Traffic would be stopt, and People's Inconveniencies not redressed.

For these purposes therefore were Gold, Silver and Copper introduced into Traffic.

But let it be remembered, that this Invention grew not up at once, but by Degrees. For there are two Stages in the Consideration.

The first Money was either small Bars of Iron, Brass or Silver, *etc.* or some times large Plates of the same Metals, and the Value was settled by the Weight. Whence the Expression, *Amicus auro contra carus non est*⁵, the Friend in one Scale, and his Weight in Gold, in the other.

⁵ See Scaligerana Prima.

So when *Abraham*⁶ bought a Burying place for his Family, He is said not *numeraſſe*, but *appendiſſe quadringentos ſiclos*. *Ἀπεκατέστηεν LXX* Interpret.

⁶ Gen. XXIII. 16.

And again, the Sons of *Jacob*⁷ are said to have found their Money in full weight. *ἐν σταμνῶ LXX* Int.

⁷ Gen. XLIII. 21.

*Vtuntur [Britanni] aut aere aut taleis ferreis, ad pondus examinatis, pro nummo*⁸.

⁸ Caesar B. Gall. V. 12.

This Practice continued some time in Rome, and *Varro* tells us, that the Scales which were used for this purpose, were extant in his time, and preserved (where doubtless they had originally been deposited) in the Temple of *Saturn*. It will be of use to observe this, as it will explain several things in Antiquity. The Denominations of Money, and several Terms of Exchange, both in the Greek and Roman Language, evidently refer us to this ancient Practice: Terms still preserved in the Language, even after the Custom was abolished, and had given place to the refinement of the Mint. *Talentum*, *Mina*, *Drachma*, *Stater*, *Obolus*, *etc.* in the Greek, are instances of what I am advancing. What was the original Signification of *Talentum*, but a Pair of Scales? As is evident from several places of *Homer*. Then, by a Figure not uncommon, it passed a *Contingente ad Rem contentam*, and expressed the Substance weighed in that Scale or Ballance. Next, it was restrained to a precise quantity of a determined Weight, and so has uniformly continued down to our time. To this practice We owe those Roman Terms, *Libella*, *Dupondius*, *Stipendia*, *Poenas pendere*, *Dispensatores*, *Impendium*⁹, *etc.*

⁹ Marm. Sandvic. pag. 26.

And thus in those imaginary Deeds of Sale, so frequent in the Roman Law, We meet with the *Libripendes*, and the *Aes* and *Libra*.

Accessi tertium Genus Testamentorum, quod dicebatur per aes et libram, sc. quod per Emancipationem, id est, imaginariam quandam venditionem, agebatur, quinque testibus et libripende, Civibus Romanis puberibus praesentibus, et eo, qui familiae Emptor dicebatur.

¹⁰ J. 2. 10. pr.

To

To this Cicero alludes:

Non verbum pro verbo necesse habui reddere, sed genus omnium verborum, vimque servavi. Non enim ea me annumerare lectori putavi oportere, sed tanquam appendere *.

⁴ De Optimo Gen. Orator.

But Trutination, as well as Permutation, had its Difficulties, and gave place to the Stamp or Mint.

Τὸ μὲν πρῶτον ἀπλῶς ὀρισθὲν μεγέθει καὶ σταθμῷ, τὸ δὲ τελευταῖον καὶ χαρακτῆρα ἐπιβαλλόντων, ἵνα ἀπολύσῃ τῆς μετρήσεως αὐτές. ὁ γὰρ χαρακτὴρ ἐτέθη τῷ πόσει σημεῖον *.

⁵ Aristot. I. Polit. 9.

The next Step therefore was what We mean by Coin or Moneta: which Paulus⁶, in the Law so often quoted, calls

⁶ D. 18. 1. 1.

Materiam, forma publica percussam, usum dominiumque non tam ex Substantia praebentem, quam ex Quantitate.

This was a Work of some Time. The Consent of People was to be had, in order to give it its Valuation, Standard, and Currency. For that was arbitrary.

The same Writer calls it *publica et perpetua Aestimatio*. Perpetua namely, in that use of the Word, in which it was applyed to the Praetors' Edicts⁷; and Publica, because it was the national Standard, the Public Faith, the *Sponsio Civitatis*; an appellation that is attributed to LAW⁷ itself. And under this public Contemplation it is, that all wise States have considered the Offence of counterfeiting or depraving it, as one of the most heinous and injurious to Civil Society.

⁷ Above, pag. 215.

This Demosthenes⁸ very well observed,

⁸ c. Timocrat. pag. 440. Ed. Cant.

Νόμος ἐστὶν ἀπόσις, ὡς ἔπος εἶπεῖν, ταῖς πόλεσιν, εἴαν τις τὸ νόμισμα διαφθείρῃ, θάνατον τὴν ζημίαν εἶναι. †

By the Cornelian, and other Laws, this Offence was capital at Rome, and the Adulteration of the public Money was made a public Crime: which made every Man a Sufferer, and gave any one a Right to complain. Nay more, made it every Man's Duty⁹.

⁹ C. 9. 24. 1.

This Adulteration was practised in several Shapes: Ulpian¹⁰ has comprehended several in one Law.

¹⁰ D. 48. 10. 8.

Quicumque nummos aureos partim raserit, partim tinxerit, vel finxerit; siquidem liberi sunt, ad bestias dari; si servi, summo supplicio affici debent.

* Quod primum simpliciter erat definitum magnitudine et pondere, ad ultimum, characterem imprimendo, ut liberaret eos a labore mensurandi. Character enim imponebatur Valoris signum.

† Receptum esse in universum apud omnes Civitates, qui monetam adulteravit, et morte mulsetur.

² Sentent. V.
⁴⁵. 1.

And Paulus²,

Lege Cornelia tenetur—qui nummos aureos, argenteos adulteraverit, laverit, conflaverit, raserit, corruperit, vitiaverit, vultuque Principum signatam monetam, praeter adulterinam, reprobaverit. Et honestiores quidem in Insulam deportantur, humiliores autem aut in metallum damnantur, aut in crucem tolluntur. Servi autem, post admissum manumissi capite puniuntur.

Moneta FALSA was, what the Emperor calls, *Nummi falsa fusione formati*. And, as the Mint was the Sovereign's, This Offence put on the Nature of High Treason, and the Punishment with the Romans was burning alive.

*Si quis nummos falsa Fusione formaverit, universas ejus facultates fisco praecipimus addici. In Monetis etenim tantummodo nostris cudendae pecuniae studium frequentari volumus: cujus obnoxii majestatis crimen committunt*³.

³ C. 9. 24. 2.

Moneta DIMINUTA concerns the Quantity, either by Filing down the Surface, or clipping the Edge, or Circumference. These Offenders are known in the Greek Law, by the Name of *Παραψάλλαι*.

⁴ D. 48. 10. 9.

Moneta ADULTERINA, ubi quis in aurum vitii quid addiderit⁴, whereby the Quality or Goodness of the Metal was affected.

The Consideration of the public Coin was generally included under one or other of these three Divisions: *Forma Principis*, *Pondus* and *Species*; accordingly as I have just now distributed it. But all Offences upon this Head were not confined to these three alone. No private person was to set a higher or lower Value upon it, than what was established by Authority⁵. Nobody was to circulate bad Money⁶. Nobody was to refuse in Payment the public Money, if not adulterated⁷, with many more of this nature. There are two Titles in *Justinian's Code*⁸, together with a Title or two in the *Theodosian*, very proper to be consulted upon the Occasion.

⁵ D. 18. 1. 1.
 pr. compared
 with D. 2. 14.
 38.

⁶ l. 1. C.
 Theod. Si
 quis folidi cir-
 culum.

⁷ Paulus l. c.

⁸ Lib. IX. Tit.

XXIV. DE

FALSA MO-

NETA, and

Lib. XI. Tit.

X. DE VETE-

RIS NUMI-

SMATIS, PO-

TESTATE.

To enter upon the extensive Consideration of the Roman Money in all its Shapes and Circumstances, is not expected, nor is it necessary, in these Speculations. However, it must be observed, that there is a Point, bearing some Relation to it, which is not to be neglected, nor can the Study of the Civil Law be carried on successfully without it.

The following are the Words of *Cujacius*,

Volusius Maecianus *ICTus*, in libro illo singulari et pulcherrimo de *Asse*, qui *Juris studiosis prius addiscendus est, quam Institutiones. Et meo judicio sane temere accedunt ad Juris Disciplinam, quibus non bene nota est Distributio Assium.*

And indeed the Law which drew from him this Reflection, is a great Proof of his Judgement. For how shall a Stranger to this Knowledge be able to understand what follows?

⁹ D. 33. 1. 21.
 2.

*Filium ex Dodrante, Vxorem ex Quadrante instituit heredes*⁹.

And

And so *Maecianus* himself, at setting out,

Saepe numero, Cenfor, animadverti aegre ferentem Te, quod Assis distributionem, et in heredum Institutione, et in aliis multis necessariam, ignotam haberet. Quae ne tam exigua res ingenium tuum ullo modo moraretur—

The Author here recommended was subjoyned to the *Theodosian Code* by *Sichardus*, in his Edition of it: by *Hotoman*, to his Treatise *de Re Nummaria P. R.* and by *Frederic. Gronovius*, to his Treatise *de Sestertiis*. It appears also with some other Books upon this Subject, both Ancient and Modern, in the XIth Vol. of *Graevius' Thesaurus Antiq. Rom.*

But I would not be understood to confine my Reader to *Maecianus* alone. Some more Modern Writers upon the Subject may be as serviceable, or more so. *Budaeus* in particular has wrote upon it very largely; and the immortal Work of *Gronovius* lately mentioned, *de Sestertiis*, is, or ought to be, the Attention of every Scholar whatsoever.

The *As* with the Romans was a small piece of Copper Money:

Ex nocturno visu etiam stipem quotannis die certo emendicabat a populo, cavam manum asses porrigentibus praebens¹:

Ten of which made a *Denarius*, and a Fourth of that *Denarius* was a *Sesterce*, as their Names themselves import².

But the *As*, *Assis*, *Assarium* or *Assipondium* was originally a Pound Weight of Metal. And this was the common Method of Traffic in the early Times, as We have seen lately,

Si proprium est, quod quis libra mercatus et aere est³.

The *As* therefore is not necessarily to be restrained to the Point of Money, though its Use therein is considerable. It is applicable to Weights and Measures, and indeed to any Quantity, with great Consistency. Its principal Service is to denote an Integral, or whatever consists of parts, and can submit to a Division of them either in Theory or Practice. It stands for a Total, or the whole comprehensive Sum, when applied to other Things, besides Money, as We may see presently.

The Knowledge therefore of the *As*, and its Divisions, is necessary for a Lawyer:

*Nunc dicam solidae quae sit Divisio Librae,
Sive Assis: nam sic legum dixere periti:
Ex quo, quod soli capimus, perhibemur habere⁴.*

And its chief Use there is the Application of it to Estates and Inheritances: so that *Heres ex Asse* must be understood of the Man that sweeps all, without any Distribution:

Idem te moriens heredem ex Asse reliquit⁵.

And so *Fannius*, just now cited, is to be understood.

Q q q 2

Pa-

¹ Sueton. Aug. §. 51.

² See Comment. ad Marmor. Sandvic. pag. 31, etc.

³ Hor. 2. Epist. II. 158.

⁴ Fannius de Ponder. l. 41.

⁵ Martial, 3. Epig. X. 3.

PROPERTY.

⁶ D. 28. 5. 13.
1.

*Paterfam. distribuere hereditatem in tot partes potest, quot voluerit : sed solennis Affis Distributio in XII uncias fit*⁶.

⁷ I. 50. §. 2.
cod.

*Hereditas plerunque dividitur in XII Vncias, quae Affis appellatione continentur. Habent autem et hae partes propria nomina ab Vncia usque ad Assem, puta haec, Sextans, Quadrans, Triens, Quincunx, Semis, Septunx, Bes, Dodrans, Dextans, Deunx, As*⁷.

Dicas,

*Filius Albini, si de Quincunce remota est Vncia, quid superet. poterat dixisse, Triens. Eu Rem poteris servare tuam. Redit Vncia, quid sit ? Semis*⁸.

⁸ Hor. ad Pifones v. 326.

Let us see them in their proper Distribution,

Vncia	—	$\frac{1}{12}$	
Sextans	—	$\frac{2}{12}$	$\frac{1}{6}$
Quadrans	—	$\frac{3}{12}$	$\frac{1}{4}$
Triens	—	$\frac{4}{12}$	$\frac{1}{3}$
Quincunx	—	$\frac{5}{12}$	
Semis	—	$\frac{6}{12}$	$\frac{1}{2}$
Septunx	—	$\frac{7}{12}$	
Bes	—	$\frac{8}{12}$	$\frac{2}{3}$
Dodrans	—	$\frac{9}{12}$	$\frac{3}{4}$
Dextans	—	$\frac{10}{12}$	$\frac{5}{6}$
Deunx	—	$\frac{11}{12}$	

⁹ upon Terence, pag. 179 Oxon. 1750.

See this considered more at large by *J. Frid. Gronovius*⁹.

A Distribution of Totals into twelve Parts particularly (for the number was in itself indifferent) has generally prevailed, and is found much more commodious than any other, for the sake of its easy Division :

*Multa Antiqui duodenario numero finiebant*²,

¹ Varro IV. de L. L. Add. Mag. I. Misc. 15. and Fabricii Inscript. pag. 96. seq. ² Huetiana. pag. 110.

and has therefore been recommended to common use, in preference to our decimal Progression¹. It was for this reason, that Astronomers divided the Zodiac into Twelve Parts or Signs, and Geometricians the Circle into 360 Degrees. Thus the Day is measured by Twenty-Four Hours, and the Year by Twelve Months.

³ Greg. Maiansius, Disputat. uris. Tom. II. pag. 53.

I stand astonished, that a late very sensible Writer upon Civil Law³, should call this in Question, and assert, that XVI would be a more convenient number for that purpose.

First, He is mistaken in the true principle of this Position. The Number Twelve is capable of being divided by Two, by Three, by Four, and by Six. And Sixteen only by Two, Four, and Eight. But if

if He means that Sixteen is capable of being split into more Aliquant Parts, where is the wonder that a greater Number should have in this, the advantage over a less: (And upon that Principle I could observe, that Twenty would be still better than his Sixteen) But even here his Mathematics fail him: For Twelve, which he rejects, is at least as good a Number for that purpose, as Sixteen, which He recommends, viz. 1. 2. 3. 4. 6. 8. 9. 10. 12. And 1. 2. 4. 6. 8. 10. 12. 14. 16. viz. Nine Aliquant Parts in each.

This Way of Computation, viz. by the *As* and its Division, is constantly followed by the Roman Writers, when they consider Inheritances. So *Julius*.

*Novissimo testamento tres instituit heredes, C. Octavium ex Dodrant, et L. Pinarium et Q. Pedium, ex Quadrante reliquo*⁴.

⁴ Sueton. Jul. §. 83.

And when *Augustus* made his Will, He left his Successor *Heredem ex Bessé*, and his Widow *ex Triente*.

*Heredes instituit primos, Tiberium ex parte dimidia, et sextante, Liviam ex parte tertia*⁵.

⁵ Sueton. Aug. §. 101. et *Tiber.* §. 23.

Which *Dion Cassius* relates thus:

Καὶ ἀλέλειπα — τὰ μὲν ΔΥΟ ΜΕΡΗ τῆς κλήρης τῷ Τιβερίῳ, ΤΟ Δὲ ΛΟΙΠΟΝ τῇ Λιβίᾳ *⁶.

⁶ LVI. 32.

That is, *Tiberius* had Two Thirds, or eight Shares, and *Livia*, One Third, or four Shares. A more equal Division, than what We find in *Juvenal*⁷ upon a sorry Occasion,

⁷ I. 40.

Vnciolam Proculeius habet, sed Gillo Deuncem.

More unequal still that which follows:

*Testamento facto Mulier moritur. Facit heredem ex Deunce, et Semuncia Caecinam; ex duabus sextulis, M. Fulcinium, libertum superioris viri; Aebutio sextulam aspergit*⁸.

⁸ Cic. pro Caecin. §. 6.

To understand this let it be conceived, that the *Vncia*, or Twelfth Part, took upon itself the Consideration of an *As*, or an Integral, and underwent several Subdivisions; as

$$\left. \begin{array}{l} \text{Sextula} = \frac{1}{6} \\ \text{Sicilicus} = \frac{1}{4} \\ \text{Duella} = \frac{1}{3} \\ \text{Semuncia} = \frac{1}{2} \end{array} \right\} \text{Vnciae.}$$

* *Tiberio relictae erant duae partes, Liviae reliquum.*

PROPERTY.

So that their Shares will stand thus,

Caecina	_____	11.	$\frac{1}{2}$
Fulcinus	_____		$\frac{2}{6}$
Aebutius	_____		$\frac{1}{6}$

		12	

It must not be imagined, that the *As* stood at these Divisions. Even its Fractions had Denominations; and *Sescuncia* stood for an Eighth of the Whole, or one *Vncia cum Semisse*; i. e. *Sesquiuncia*, *Vncia Sesquialtera*.

Habita ratione Legis Falcidiae: scilicet, ut partis dimidia, quae ad eum ex bonis patris pervenit, quartam, id est, totius assis sescunciam retineat ⁹.

⁹D. 37. 5. 5. Pr.

Id est, One Fourth of the Half, or, One Eighth of the Whole.

And it must also be attended to, that this Consideration of the Estate, as divisible into XII. Parts, is not necessary, or perpetual. Sometimes the Law, sometimes the Act of the Testator, shall break through it. For instance: If a Man dies, leaving another his Heir *ex Semisse*, and says no more, that *Semis* now stands *in loco Assis*, and the whole Estate shall pass: Because, by the Roman Law ¹, No Man could die *ex parte testatus*, and *ex parte intestatus*. So, if He leaves Two *ex Quadrante*, there the Law considers them in the same Light, as if he had left them *ex Semisse*.

¹J. 2. 14. 5.

Si minus distribuit, potestate Juris in hoc revolvitur: ut puta, si duos heredes ex Quadrante scripserit: Nam Hereditas ejus residua accedit; ut ex semissibus videantur scripti ².

²D. 28. 5. 13. 2.

Again. The Testator may make what Separations He pleases:

Potest quis in quocunque voluerit plurimas Vncias suam hereditatem dividere ³.

³J. 2. 14. 5.

If *Sempronius* dies, and leaves *Caius* his Heir *ex XII. Vnciis*, and *Titius ex VI*, the Estate shall divide by XVIII. (instead of XII.) and *Caius* shall have Two Thirds, and *Titus* one, which comes to the same, as if he had left *Caium ex Bessé*, and *Titium ex Triente*.

Si excesserit in divisione duodecim uncias, aequè pro rata decrescet: ut puta, Mea ex duodecim unciis heredem, Te ex sex scripsit, Ego hereditatis habeo Bessém, Tu Trientem ⁴.

⁴D. 28. 5. 13.

4.

⁵ See Suetonius cited above pag 493.

⁶ §. 6. eod.

⁷ Il. de Selter.

⁸ VII. Att. 2.

So again, if a Man leaves *duos heredes ex asse*, and a third *ex dimidia parte et sexta*, or *Bessé* ⁵, the Estate shall be split into Twenty Shares. This Third Man shall have Eight, and the other Two, Twelve between them ⁶.

And in this manner *Gronovius* ⁷ thinks that remarkable Passage ought to be expounded in *Cicero* ⁸:

Fecit palam te ex libella, me ex teruncio:

vix.

viz a Division by Fifteen. It is something singular, that *Tully* should affect this odd Language here, *viz. Libella* for the *As*, and *Teruncius* for the *Quadrans*.

There is no occasion to enter into more particulars. An Elementary Book is only to lay the Ground-work. An Author in my Circumstances must not be too learned: He must give his Readers fair play in the Superstructure, and leave them something to flatter their Improvement.

I would only add, that this Theory is still capable of being made farther useful. For instance: *Maecianus* gives us a Description of the Marks, the Notes, or Signatures, that stand to express these several Denominations. The *Vncia* is marked thus —. the *Sextans* —. the *Quadrans* ——. the *Triens* ——. the *Quincunx*⁹ ——. And from this last Figure We come at the Rationale of the *QUINCUNX* in Gardening and Planting.

⁹ See Vigenere Annot. sur Tite-Live, pag. 1509.

Quid illo Quincunce speciosius, qui, in quamcunque partem spectaveris, rectus est?

¹ Quintilian. VIII. 3.

It never appeared in any Remain of Antiquity, till *Maffei* lately produced one from an Inscription upon a Copper-Plate at *Piacenza*, where it occurs twice, and is a singular Curiosity².

² Museum. Veron. See pag. 381. 397. 403.

In like manner *DECUSSATIM*, *DECUSSATIO*, and *DECUSSARE*, which is to draw Lines in the Figure of a *Saltier*, or St. *Andrew's Cross*, is taken from the *Nota*, the Abbreviature, the Character, of the *Decussis*. My Reader will be apt to ask me, what is the *Decussis*. And when I have told him that, I have let him into all the fundamental Principles of this Numeration. The *As*, as it divides into *Vnciae*, and those *Vnciae* are minutely subdivided also, (according to what We have just now seen) so is it, on the other hand, compounded or multiplied. *Tressis* is Three *Asses*, *Quadressis* Four, and *Decussis* Ten. We read also of *Vicesis*, a Combination of Twenty *Asses*, *Tricesis* or Thirty, and lastly of *Centussis*, where the Gradation stops, and is observed to mount no higher. This *Decussis*, as it consisted of Ten *Asses*, was often used for *Denarius*, as it well might be; and its Mark or Note was then, as we learn from *Priscian*, and *Sosipater*, what I have described.

But I observed above, that the *As* is the common Standard of many Things besides Inheritances. And here I come to consider that Matter. Thus it is applicable to *Res*, as well *Incorporales* as *Corporales*, indifferently; for example: to Usury or

INTEREST.

Quidam cavisset, Se quotannis quincunces usuras [Id est, Five per Cent.] praestaturum: et, siquo anno non solvisset, tunc totius pecuniae ex die, qua mutuatus est, semisses soluturum, [Or, Six per Cent.³]

³ D. 22. 1. 17.

So^{pr}.

So when *Festus* writes,

⁴ *Festus*.

Vnciaria Lex dicicoepta est, quam L. Sulla et Q. Pompeius Rufus tulerunt, qua sanctum est, ut Debitores decimam partem . . . Cetera defunt⁴.

Some have a scruple in restoring *duodecimam*. For my part, I have none. Whatever the Interest was, it was *computed* at least by *Vnciae*, or *Twelfth* (not *Tenth*) Parts, as the Words of the Passage plainly make appear. *De Vnciario Foenore*, see *Livy*⁵, *Tacitus*⁶, *Gronovius*⁷, *Gothofred*⁸, etc.

⁵ VII. 16.

⁶ VI. Annal.

⁷ 6 Not.

⁸ De Pec. Vet. III. 13. et de Centesimis et Vnciis Mensuris.

⁹ ad D. 26. 7.

47. 4.

⁹ Varro I. de R. R.

¹ V. 24.

² V. 1.

To LAND most frequently :

Jugeri pars minima dicitur scrupulum, id est, decem pedes, et longitudine et latitudine quadratum. Ab hoc principio Mensores nonnunquam dicunt in subsicrum esse Vnciam Agri, aut Sextantem⁹.

So *Livy*¹ :

Triumviri ad id creati terna jugera et septunces viritim diviserant.

And *Columella* calls² the *Septunx*, *Dimidium Jugeri cum parte duodecima*.

Si a me bestem Fundi emeris, a Titio trientem, deinde partem dimidiam fundi a Te quis petierit : siquidem ex bestie, quem a me acceperas, semis petitus fuerit, Titius non tenebitur : Si vero triens, quem Titius tibi tradiderat, et sextans ex bestie, quem a me acceperas, petitus fuerit, Titius quidem pro triente, ego pro sextante evictionem tibi praestabimus³.

³ D. 21. 2. 39.

2.

⁴ Reines. XX.

62.

SET QVATVOR VNCIAS FVNDI LVCARPIANI QVOD EST CONSTITVTVM IVXTA SCM. CYPRIANVM VIA LABICANA INTER AFFINES FVNDI CAPITINIANI IVRIS SCE ECCL. ROM. SED ET FVNDI FLAVIANI IVRIS PVBLICI IVXTA SABINIANVM⁴

SOCIETAS,

Societatem mecum coisli, ea conditione, ut Nerva amicus communis partem societatis constitueret : Nerva constituit, ut tu ex triente socius esses, ego ex bestie⁵.

⁵ D. 17. 2. 76.

PRECIVM.

Papinianus quaerit, si Patronus praedium, quod emerat, pro quo precii bestem exsolverat⁶ —

⁶ D. 17. 1. 12.

8.

TIME.

Lucere dodrantes semuncias horarum ab secundo adjicientem usque ad plenum orbem, detrahentemque in diminutionem⁷.

⁷ Plin. II. 14.

AEDIFICIVM.

Quintus frater, qui Argiletani aedificii reliquum dodrantem emit HS DCCXXV, Tusculanum venditat⁸.

⁸ Cic. I. Attic.

14.

I shall subjoin a very curious Discourse upon the Commerce of the Romans by a very good Hand, which my Reader will perceive without my Information, to be the best Thing in this Performance.

C O M-

COMMERCE DISCOURAGED BY THE ROMANS,

A S

A THING PREJUDICIAL TO THE STATE.

BY the Roman Law, whosoever lent Money to repair or rebuild a House in the City of Rome, had, without any farther Agreement, a tacit Pledge or Mortgage (*jus tacitae Hypothecae*) of such House¹: so as to be preferred to other Creditors². And this is said to be enacted for the *Public Utility*, that the Aspect of the City might not be deformed by Ruins; for the Romans with incredible Pains and Care promoted the Splendour, Ornament, and Magnificence of their City: and to this end many Laws were made by the *Decemviri*, the Emperours *Augustus*, *Trajan*, *Hadrian*, *Marcus*, and that remarkable Law of *Vespasian's*, mentioned by *Suetonius*, in his Life of that Emperor³, by which it was lawful for any one to *build up all empty Shells of Houses, and enjoy them as his own, if the Owners of them left them unfinished.*

Most Interpreters of the Civil Law are of Opinion, that the same Law obtained in favour of Commerce, and that Ships built or refitted with Money lent, were tacitly pledged or mortgaged to the Lender. But with great Deference to learned Names, I believe the contrary may be proved to be true, and beg leave to observe, that such a Law would most certainly be prejudicial to Navigation; for so it might often happen that Ships would be detained by Creditors, and Commerce hindered. *Constantine* the Emperor in three Constitutions, which are extant in the *Theodosian Code*, forbids the Detaining or Damaging of Ships, so as to prevent or retard their Voyage, on any pretence whatsoever⁴. And it was wisely provided by the Laws of *Athens*, that all Law-Suits relating to Commerce should be carried on in those Six Months only, in which Ships were not used to put to Sea, that so they might not lose their Voyage by the Impediments of Law-Processes: Husbandry-Tools, and Instruments likewise were forbidden to be pledged, and whosoever detained them on any Pretence, was fined four-fold the Value of them, lest by such Detention the Lands should lie uncultivated.

It is most certain that the *Romans* did not take the same care of Ships as they did of Houses, since they appointed particular Officers called *Aediles*, whose business it was to see that the Buildings of the City were kept in good repair: but where do we find that they ever appointed any Magistrate, whose particular business was to inspect the Affairs of Navigation? Not one Law was made in favour of Commerce, in the times of the Commonwealth: on the contrary, it was greatly discouraged as introductory of Riches and Luxury, which were esteemed to ill suit with the Severity of their Manners.

R r r

Livy

¹ D. 20. 2. 1.

² D. 20. 4. 5.
³ l. 6. cod.

⁴ Tit. de Naviculariis.

³ XXI. 63.
⁴ Verr. VII.
 18.

*Livy*³ and *Cicero*⁴ inform us, that in the year of *Rome* 535, a Law was made, that no Senator, or the Father of a Senator, should have any Ship above the burden of 300 *Amphorae* (a Ship of that Size was held to be large enough to carry all his own Corn and Fruit) and all Gain was held scandalous in a Senator. This Law was confirmed by *Jul. Caesar*, when he was Dictator⁵. The *Thebans* also made a law, that no person should be capable of any Office in the State, unless he had desisted for the space of ten years from all Trade. The *Romans* went still farther when they absolutely forbid all Merchandizing to the Nobility⁶. Nay sometimes Merchants themselves were compelled to refrain from Trade by way of Punishment, though no Man could be compelled to be a Merchant⁷. Moreover the *Romans* were prohibited to trade beyond *Nisibis*, *Callinicus*, and *Artaxata*⁸. And Confiscation of goods, and perpetual Exile was the punishment of the Offenders⁹.

It may be asked why so many Laws against Trade? I answer because it was so far from being Serviceable, that it was *Prejudicial to the Roman State*. This will seem very strange to the Inhabitants of this Island, who every day find the benefit and advantage of Commerce. It is expressly said¹, that *Merchandizing is pernicious to Cities*. The reason of this will appear hereafter.

Commerce may be advantageous to a State for divers reasons. *Plutarch* says it is of Service in gaining the friendship of Princes, and the good will of Foreign States; Besides it increases the public Customs, and Revenues of a State, and the more Merchants flock to any City, the greater Tribute and Gain is acquired, as *Xenophon* expresses it in the beginning of his Book *de Reditibus*. And lastly hence proceeds Plenty, and Affluence of Riches, and the Multitude of People in a State. *Diodorus Siculus*² tells us that *Themistocles* persuaded the People of *Athens* to build 20 new Ships every year, and to grant Privileges and Immunities to Artificers, that so the number of Inhabitants might be increased, and Variety of Arts be introduced, for he looked upon both these as conducive towards Establishing a Power at Sea.

² XI. 43.

But the *Romans* went another way to work. They by *Humanity*, *Terrour*, *Triumphs*, *Tributes*, and *Taxes*, imposed on the Conquered Countries, increased the Riches of their City. They drew all Nations to *Rome* by the *Splendour of their Buildings*, and the *Magnificence of their Public Games and Spectacles*, and the *Freedom of the City*, which they granted to Strangers. And such was the vast Concourſe of People to *Rome*, that they sent above 160 Colonies into *Italy* alone:

³ Jovenal.
 III. 62.

*Jampridem Syrus in Tyberim defluxit Orontes*³.

It would be very idle to cite passages from ancient Writers to prove that the *Romans* were an immensely rich People. It is a well known saying of *Crassus*, that no Man ought to be esteemed rich that could not main-

maintain an Army out of his own Revenue: But so far was Commerce from adding to their Riches, that it greatly diminished them.

Pliny gives a remarkable instance of this⁴, where he complains that the *Indies* and *Arabia* took away every year from the *Roman Empire* near 30,000,000*l.* Sterling of our Money [Qu. not half a Million.] Add to this the great Sums of Money sent to so many other Provinces, from whence the *Romans* had in *Exchange* the most delicate things that could in any wise contribute to *Luxury*, according to *Sidonius Appollinaris*⁵. For all these things they paid *Silver* and *Gold*, having nothing of the Product of their own Country to exchange for *Merchandizes*. Hence it was that the Emperours forbid the People to send *Gold* to the *Barbarians*⁶; which Law was in force before, as appears from *Cicero's* Oration for *L. Flaccus*:⁷ *Exportari Aurum non oportere, cum saepe antea Senatus, tum me Consule, gravissime judicavit.* The reason of this Discouragement given to Commerce was, that it carried away their Money and brought them nothing in return but *Luxury*, the Bane of Virtue and Destruction of Empire. I need not observe that after the Conquest of *Asia*, all sorts of *Luxury* were introduced into *Rome*, and utterly enervated and overturned an Empire, which seemed to be eternal.

Saevia Armis

*Luxuria incubuit; victumque ulciscitur Orbem*⁸.

I expect it will be objected that many passages of the *Roman Law*, and of the antient Writers seem to contradict what is here advanced. We read in *Suetonius*⁹, that the Emperour granted great Privileges and Immunities to Shipbuilders and Merchants, particularly that if any trading Ships were cast away, or damaged by Storms, the State should bear the Loss. We also find in *Tacitus*¹ mention made of a Constitution of *Nero's*, that the Ships of Merchants should not be entered in the Books of Rates, nor any Customs paid for them. *Lampridius* in the Life of *Alexander Severus* tells us, that Emperour granted to Merchants divers Immunities. And *Vlpian*² speaking of a certain Privilege granted to Merchants gives this general reason, because *Navigation is of the greatest advantage to the State*.

In answer to this I observe that all these passages relate to Corn Merchants, who imported Provisions in their own Ships for the use of the City.

Claudius gave great and certain advantages to Merchants for this reason: that once, in a time of great Scarcity of Provisions, he was stopt in the *Forum* by the Populace, and so disagreeably entertained with Scandal and Crusts of Bread, that he with great Difficulty got out of their Clutches by a Backdoor; and from that time he made it his great care and concern to get Corn imported even in the Winter. The same *Claudius* granted the Freedom of the City to him that built a Ship capable of 10,000 *Modii* of Bread-Corn, and had applied it to

R r r 2

that

⁴ VI. 23.

⁵ Carm. V.

⁴².

⁶ C. 4. 63. 2.

⁷ § 28.

⁸ Juven. VI. Sat. 292.

⁹ Claud. § 18.

¹ XIII. Annal. 5. 1.

² D. 14. 1. 1. 20.

¹ Tit. III. 6. that Service for Six years, as *Vlpian* informs us¹. And to this may be
² D. 47. 9. 3. 8. refer'd the *Senatus Consultum* produced in the *Digest*².

It is said that *Nero* granted Privileges and Immunities to Merchants and Traders: but what sort of Merchants and Traders they were,
³ D. 50. 5. 3. *Scaevola*³ informs us, viz. such as built Ships for the Importation of Corn, capable of 50,000 *Modii*. So long as they were employed in that Service, or others in their room, *Such persons were exempted from Public Offices*. It is certain that this privilege granted by *Nero* extended to none but the Traders for Corn, as appears from *Tacitus*⁴.

⁵ The Occasion of this Constitution we learn from *Suetonius*⁵, where he says the Populace were highly incensed against that Emperour, because in a time of great Scarcity, a Ship from *Alexandria*, instead of Corn was said to have brought nothing but a Cargo of *Dust* for the Court-Wrestlers.

The same may be said of the Immunities granted by *Alexander Severus*.
⁶ D. 50. 6. 5. They extended only to Corn Merchants, as appears from *Callistratus*⁶, who lived in that Emperour's time, and *Paulus*⁷, to whose Counsel *Severus* paid a very great regard, and from *Vlpian*⁸, who was in good repute with that Emperour. These Corn Traders were likewise a Corporation,
⁹ D. 14. 1. 1. which enjoyed many Privileges and Immunities⁹, which to entitle themselves to, they were obliged either to navigate Ships in Person, or to employ the greatest Part of their Substance in the Corn Trade.
¹⁰ D. 3. 4. 1.

The same Immunities were granted to the same sort of people by the Emperour *Constantine*, as appears from a whole Title of the *Theodosian Code*¹. This Law seems to have been made, that the City of *Constantinople*, which *Constantine* had built about four years before, might be the more readily supplied with provisions.

From what has been said it appears that these Privileges were granted in favour of the Corn Trade, and extended no farther. But it may be asked, why so many Provisions made, and Encouragements given for the Importation of Corn? I answer, the Roman Territory did not produce sufficient for the Sustainance of so great a number of Inhabitants, for which reason it was imported from *Sardinia*, *Sicily*, *Africa*, and *Spain*². At first the *Aediles* distributed Corn at a very low price, in process of time *gratis*. *Clodius* was the Author of a Law, by which Corn was to be distributed to the People *gratis*; nor was the Expence of it small. *Plutarch* tells us, that in *Cato's* time there were spent in that Commodity 1250 *Talents*. *Jul. Caesar* after the Conquest of *Africa* imported 1,200,000 Bushels for the use of the People. A Bushel weighed ordinarily about 25 Pounds. *P. Victor* relates that *Augustus* imported yearly from *Aegypt* 20,000,000 Bushels; Double the quantity was sent from *Africa*, as *Josephus* informs us. In the times of the Emperour *Justinian*, 8,000,000 Bushels were carried from *Aegypt* to *Constantinople*³. Of so great concern was the provision of Bread-Corn, that *Augustus*, finding in the Granaries but enough for three Days, determined to kill himself by Poison, had not the Corn Fleets arrived from the Provinces within that Space of time.

¹ de Naviculariis.

² Tacit. XII. Annal. Plin. Paneg.

³ Edict. Justin. XIII. 8.

I HAVE but little to subjoin to these just Reflections, which I have here presented to the Public for the first time. I would only add, that every Branch of the Roman History and Character justifies the Truth of these Observations. A People of Soldiers, whose Trade was their Sword, and whose Sword supplied all the Advantages of Trade; who brought the Treasures of the World into their own Exchequer, without exporting any thing but their own personal Bravery; who raised the public Revenues, not by the Culture of Italy, but by the Tributes of Provinces; who had Rome for their Mansion, and the World for their Farm; A People, I say, of this Discipline and Constitution, could have no leisure to set forwards the Article of Merchandize, nor were they very likely to pay any Regard to the Character of its Professors. And We find just reason to make that Conclusion, not only from the Genius of the People themselves, and the National Characteristic; but also from the frequent Expressions, which have escaped several of their Writers; and from that Apprehension of the Matter, which is to be gathered from some of their Public Constitutions.

To the great Article of the Field-Service tended the whole Plan of their Education; and I am persuaded that *Virgil* had an Eye to it in these words, which yet are not applied to the Romans:

*Venatu invigilant pueri, silvasque fatigant :
Flectere ludus equos, et spicula tendere cornu.
At patiens operum, parvoque adsueta Juventus
Aut rastris terram domat, aut quatit oppida bello.
Omne aevum ferro teritur, versaque juvencum
Terga fatigamus hasta : nec tarda Senectus
Debilitat vires animi, mutatque vigorem.
Canitiem galea premimus*.*

* Virg. IX.
Aen. 605.

Every body knows, that no Employment with these People was reputed honourable but the Plow and the Sword. And hence, as both *Pliny*⁵, and *Columella*⁶ inform us, an Enrollment into any of the four City Tribes was reckoned less honourable. *Sub umbra Civitatis intra moenia desides cunctari* did not at all suit with a Roman Spirit. It was the Original Trait of the Constitution, as We are assured by very good Authority, and of the Appointment of the Founder himself, that his Subjects should be brought up to these two Professions alone; and that the illiberal Counter and Shop-board, though ever so necessary, should be consigned to Aliens and Slaves; because He imagined that the domestic and sedentary Arts would tend to break the Spirits and enervate the Limbs of a People, that He designed to be Masters of the World. And my Author adds⁷, that for a long period the mercantile Professions were look'd upon as unsuitable to the Roman Character: and not a Citizen was found to practise them. Every Roman therefore was a Soldier by Birth, and a *Gentleman Volunteer* by Nature. So that when We come to describe them, as it were, constitutionally,

⁵ XVIII. 3.
⁶ Praef. lib. I.

⁷ Dionys.
Halic. II. 28.

tutionally, We may with the same Propriety apply to them, *the Militia of Rome*, as the fashionable Practice is at this day to describe another Constitution, by the *Religion of Malta*. We have reason therefore to think it in a great measure true throughout the whole Period of the Roman History, what one of their Writers has recorded of the First⁷, viz. *That to scale the Breach, and beat down the Opposer, in the sight of the Roman Army, was Riches and Honour, and the only National Nobility.*

⁷ Salust. B. Catalin. § 7.

⁸ Above pag. 114.

⁹ IV. 16 seqq.

¹ L. 43.

² Gell. XV. 7.

³ Dionys. Halic. II. 2.

⁴ Id. II. 16.

⁵ Above pag. 210.

⁶ D. 1. 2. 2.

¹⁵.

I add, what I do not remember to have ever seen insisted upon, that their Incorporation and Polity, the Cast of their Civil Government, was of a military Nature. If my Reader will turn back to that Distribution which *Servius* made of his People⁸, He will find it at first sight to carry the Appearance rather of a Muster, than a political Settlement. And whoever pursues the Detail of it in *Dionys. Halic.*⁹ in *Livy*¹, and others; when He sees the Distinction into Horse and Foot, into Regiments and Brigades; the Provisions for Pioneers, and the necessary Attendants upon an Army; when he finds that their *Comitia* were Encampments, and their *Lustra*, Reviews, He can scarcely be of another mind. I do not love to contradict the Antients especially. But when they tell us², that the *Comitia Centuriata* were held out of the City Walls, because this Assembly was covered with the Roman Army during their Sitting, (and the Troops of the Republic were never to be drawn up within the City) is it not a fairer and more probable Supposition, viz. that this Assembly itself was Military? A very valuable Writer among them, and who looked deeper into the Constitution than most of them, when He compares the number of Inhabitants between the time, that *Romulus* laid the Foundation of the Empire³, and That, when He was taken from it⁴, at the former period reckons 3000 Foot and 300 Horse: and at the latter 46,000 of the One, and 1,000 of the Other. Why this precise Way of considering them, unless He conceived them, as they really were a Nation and a People of Soldiers? It is also proper to observe, that for a long time the Civil and the Military Officer was the same: the same that distributed Justice, and commanded their Legions: till the Increase of Empire, and the Multiplicity of business occasioned the disunion, and tied down the Praetor to his Jurisdiction in Court, who for some time had been their Commander in the Field⁵. I observe moreover, that all Delegations of Power ran in the same Channel: The Man who held the *second place* in the State⁶, was constantly a Field Officer. Thus *Romulus* had his Lieutenant or *Tribunus Celerum*: And upon the same Plan, the Dictator had his *Magister Equitum*: the Consuls and Praetors, when they went into the Provinces, had their *Legatus*, and the Emperours their *Praefectus Praetorio*.

It was the natural Consequence of all this, that no Man could be greatly valued at Rome, who was not of the Profession of his Country. It is observable, that every Society of Men is apt to value Mankind by their own Manufacture, and to judge by the Staple. When I call a
Man

Man upon 'Change a *Good Man*, there is a locality in the Expression : which will have another Meaning at the Distance of four or five Miles from Cornhill. There is scarce a Man of Letters, but has at one time or other found himself in a Company of Men, where He would have appeared with much greater advantage, if He had been better versed, or only had attained to a greater degree of Eminence, in some of our *Rural Diversions*, than what falls to the Lot of Many to be possessed of. Shift again the Scene to Colleges and Seats of Learning, there the Countenance is generally open, the Honours extended, and the Distinction paid to Eminence of another Complexion. Thus it stood doubtless at Rome between the Soldier, and the Merchant. The Romans were indeed Adventurers, but of another Sort : Their Gain was Glory, and Tradesmen were little better than Sutlers. For it is but a cold Compliment that *Tully*⁷ pays to Commerce : when he says, ^{7 I. de Offe.} that it is impossible for the Counting-House to admit of any thing in-^{42.}genious : that Trade, when confined to a narrow Circle, was sordid and illiberal; and the most extensive, *sin magna et copiosa, multa undique apportans*, non admodum vituperanda. *Columella* in the Preface I lately cited, speaks of Navigation like a true Roman :

An Maris et Negotiationis Alea sit optabilior, ut rupto naturae foedere, terrestre animal, Homo, Ventorum et Maris objectus irae se fluctibus audeat credere, semperque ritu volucrum, longinqui litoris peregrinus, ignotum pererret orbem?

And again, a little below,

Itaque in hoc Latio et Saturnia Terra, ubi Dii cultus Agrorum progeniem suam docuerunt, ibi nunc ad hastam locamus, ut nobis ex transmarinis provinciis advehatur frumentum, ne fame laboremus, et vindemias condimus ex Insulis Cycladibus ac regionibus Baeticis, Gallicisque.

And accordingly We find, that Mechanics of a low Employment were incapable of succeeding into any Dignity of the State³. This was a Constitution of the Emperour *Constantine*, and though the Expressions are descriptive enough, to limit his Meaning to the lower Occupations, *ultimis negotiatoribus — abjectis officiis — deformibus ministeriis — omni officiorum faece*, however such a Spirit of Law is not very favourable to Industry and the Purposes of Commerce in general. And it must not be forgotten, that the Incapacity in this Rescript was more extensive than may at first sight be concluded. For in his Recital We find the word *Stationarii*. Now the *Stationes* and *Tabernae*, as We have reason to be assured from what *Gothofred* has observed upon two Laws of the Digest², will comprehend all that keep open Shop. And I am apt to believe that when *Tully* just now cited distinguished his Dealers into two sorts, and held the One to be extremely disreputable,^{2 D. 42. 4. 7-13-47. 10. 15. 7-}
the

the Other contemptible enough, He had an Eye to the Retail Trade, and the Wholesale. And we may remark moreover, that in a Constitution of the Emperor last cited², where He declares, what should be Disparagement of Marriage in the Persons of Senators (for the Romans were very jealous of that Matter in their great Officers³) We find all Contracts forbid with *Tabernariae, Tabernariarum Filiae, et quae mercimoniis publice praefuerunt*: Which Expressions no one will dispute to comprehend all such as dealt in the Retail Trade, let their Credit, their Substance, their Manufacture be of what Consideration it will.

Nay farther, the Artificer, and the Menial Attendants upon the Camp, were excluded even the Service⁴: and the Distinction between the *Pagani* and *Milites* was raised so high, that nobody in Trade was allowed the Privilege of wearing a Sword, unless upon a Journey, and even then with proper Abatements and Restrictions. And on the other hand, the Soldier was denied the use of every Profession but his own⁵. But this Restraint does not seem to extend to Veterans, nor was it reasonable it should.

Upon this Head it might not be amiss to observe, that the *Thebans* (the *Thebans* indeed were no great Masters to copy after) had a Law, *That no one should be capable of a public Office, who had not discontinued Trade for the space of Ten Years*⁶. And we find, that many of the Antients besides had but a very mean Opinion of the Arts, which were vulgar and mechanical; as is plain from *Xenophon, Plato, Aristotle*, and *Philostratus* in his Life of *Apollonius*. So that We have little reason to wonder at this Spirit of the *Romans*, or to be astonished in a Military Country, to hear any one of them express himself in these Words: *Quaestus omnis indecorus patribus visus est*⁷.

But it was not the National Genius of this People alone, that turned aside their Attention from Trade. The Terms of Defiance, upon which they lived, in consequence of it, with all Mankind, would have prevented all the good Effects of Commerce, had their Martial Spirit given them leave to pursue it. That restless Spirit *Imperii propagandi*, which kept their Levies a-foot, and their Swords in their hands, for a succession of Centuries, was fatal to Factories and Correspondence. The World was in Arms, and Insurances and Under-Writing were but a dead Letter.

If these Considerations alone were not sufficient, which yet I think they are, to account for this great Feature in the Character of the Roman People, I might add that the extreme Parsimony of the first Ages (which was of a longer Continuance there than in any Nation besides⁸) did not tempt or lead them to the Considerations of Exchange: and when They became more numerous and more luxurious, the Successes in their National Attainment abundantly supply'd the Place of it. *Bellum se ipsum alet*, was the Saying of a very distinguished Statesman⁹; and this People, if any, were doubtless possessed of the Secret how to fill the Exchequer of their Country, by those very means, which discompose the Finances of other

² C. 5. 27. 1.

³ Above pag.

304.

C. 5. 5. 7.

⁴ C. 12. 35.
vnic.

⁵ C. 4. 65. 31.
1. ult. eod.

⁶ Aristot. III.
Polit. 3.

⁷ Liv. XXI.
63.

⁸ Liv. Praef.
1. 1.

⁹ Cato in Li.
v. XXXIV.
9.

other nations; and could *cauponari bellum*, if I may be allowed to give that Phrase a Meaning it has not yet been acquainted with. The Troops of the Republic, both Officers and private Men, served their Country *gratis* for many years: and during that time, and after, They found their Emolument in some Assignments of Land, and other Perquisites, which arose from the Reduction of the States, with one or other of which They were perpetually engaged. To give a single Instance out of many: In the Year 429, when the Romans accepted the Submission of the Samnites, the Conditions were, that the Samnites should cloath the Roman Army, and advance a whole Year's Pay¹. Thus this Capital of the World grew² immensely rich, by throwing the Expence of the War upon the Enemy, and by sharing with the Legionary Soldier in his military Dividend; and without any visible Trade whatsoever, without any kind of Manufacture or Exportation, saw the Treasures of the World come into her Ports, as She called for them, or had occasion to make use of them.

—Fert Indus ebur, Chaldaeus amomum,
Assyrius gemmas, Ser vellera, thura Sabaeus,
Atthis mel, Phoenix palmas, Lacedaemon olivam,
Arcas equos, Epirus equas, pecuaria Gallus,
Arma Chalybs, frumenta Libys, Campanus Iacchum,
Aurum Lydus, Arabs guttam, Panchaia myrrham,
Pontus Castorea, blattam Tyrus, aera Corinthus,
Sardinia argentum, naues Hispania defert³.

So true a Prophet was one of their Kings (*Ancus Martius*) that He opened a Port at Ostia, *praesagiens animo, futurum, ut totius mundi opes et commeatus illo veluti maritimo urbis hospitio reciperentur*⁴.

² Sidon. A-
pollinar.
Carm. V. 42.

³ Florus I. 4.

It is no wonder therefore that in all the Magnificence of Rome, and the Splendour of some very unnecessary Buildings, We meet with nothing like a Burse or Public Exchange for the Resort of Merchants, and the Circulation of Commerce. And upon this Principle it is, that all the Terms of her Traffic amount to no more than the Articles of Farming and Excising.

It is not to be understood by this, as if they never put to Sea, and neglected all intercourse with their Neighbours. The Contrary is true in many Instances. And I come now to give some Account of their Navigation.

They began with Sicily. When *Demosthenes* said of Athens (and He said it more than once) *There is no Country in the World, that imports so much Corn, as they did*, He had no Idea of the People I am concerned with: to whom it might be applied with much greater Propriety. The Attention therefore which they had to Sicily, their Interest in securing the Tenure of it, both from the Commodiousness of its Situation, and the Growth of the Soil, made a very considerable Part of their History. It was the first place where the Romans set footing, out of Italy: it was the

⁴ C. Leptin.
p. 17. T. III.
and
pro Corona.
pag. 501. T.
II. Edit. Cant.

first State, which was reduced to the Form of a Province : And it was so attached to the Roman Interest, that whatever grew in it, might be esteemed as so much ready Money at Rome⁵. Cato therefore had not only good reason for calling it *Cellam penariam Reip.*, *nutricem plebis Romanae*⁶, but, to shew the Importance of it to the Roman State, it will be proper to add the Words of Tully, which immediately follow :

⁵ Cic. II. Aët.
in Verr. Lib.
II. Init.
⁶ Ibid.

Nos vero experti sumus, Italico maximo difficillimoque bello, Siciliam nobis non pro penaria cella, sed pro aerario illo Majorum vetere ac referto fuisse. Nam sine ullo sumptu nostro, coriis, tunicis, frumentoque suppeditato, maximos exercitus nostros vestivit, aluit, armavit.

⁷ III. 22.

But their Dealings were not confined to Sicily alone. For so far back as A. V. C. 244, the very Aera of the Common-Wealth, We find them carrying on a kind of illicit Trade upon the Coasts of Africa. In that Year Polybius⁷ mentions a Treaty between this little Republic; and those who were destined to rival them, and to submit to them hereafter, the Carthaginians. In this Treaty, and some Renewals of it afterwards, it is pleasant to observe the future Masters of Mankind stipulating, like very small Merchants, to keep within proper Bounds at Sea, to confine their *Buccaniering*, for it was no better (the Term is *ληΐζεσθαι*), within a particular Point, and never to double a certain Cape, that lay off of Carthage, unless they were compelled by stress of Weather. These Conditions on the side of the Carthaginians, shew a great Power at that time of day, or a great Spirit, that could in a manner give Laws to Trade: and on the side of the Romans, it speaks little of a Maritime Power, to submit to Terms, which must be of the hardest Digestion to any People that turned their Thoughts, with the smallest Degree of Attention, to the Considerations of Commerce and Navigation.

^{*} XII. Init.
⁹ De emenit.
Legat. T. II.
Edit. Cant.
pag. 211.
¹ §. 17. p. g.
333. Notar.

For I cannot but observe, that the united States of Greece, even in the very Zenith of their Power, did no more, when by a Treaty, that is to be seen in *Diodorus Siculus*⁸, *Demosthenes*⁹, and *Lycurgus*¹, they cramped the Persian in his Marine, and obliged him to navigate his Ships of War, within, what We should call now, a certain point of the Compass only.

But it is plain what Condition the Roman Fleet was in, from these Reflections following. When They made their Descent upon Sicily, the Troops were put aboard some Transports, which they borrowed of their Neighbours: and in a Treaty which they made with the People of Carthage, a few Years before the breaking out of the Punic war, the Carthaginians articted to serve the Romans with Merchant-Men for their Trade, and such Ships of Force, as they might occasionally want. This demonstrates, that they had some Feeling for Commerce, but had no Strength of their own, that was considerable, to support it.

² Liv. IX. 30.

Indeed in the Year 445², they seemed to turn their Thoughts that way, and created a Sea Officer, with some Jurisdiction. And I have another

other Argument to raise from thence. For he was not a perpetual or a standing Magistrate, but to be laid aside, when he was not wanted. Their Marine therefore could be in no great Condition.

Polybius very justly observes, that they never made any figure by Sea. Indeed they never engaged in a Naval Action before the Punic War, A. V. C. 493. or scarce knew the first Principles of Ship-Building. For some time after this, so far down as the Year 563. when they were engaged with *Antiochus*, it was remarked of them, that they were very unskilful in the Art of Navigation. And when they arrived at their utmost Perfection, the general use they made of their Fleet was, to convoy home the Spoils of ruined Provinces, and bring to the Roman Market the Corn from the several Granaries of Sicily, Africa and Aegypt.

But the other Parts of the World were differently circumstanced; and there was a different Face of Things, both before that Empire grew up, and after it fell to pieces. The States of Europe which were formed upon its Ruins, dealt but little in the Arts of that *Leonine* Society. There was a kind of Equality thrown in to leaven that System. This produced the good Effects of Independency, to quicken their Industry; and of friendly Communion, which brought their Goods to Market. So that what was the *Ερπον* of the Romans, was the *Πάρερπον* of all People besides. Peace was their natural Situation, and War was only a Measure taken up occasionally, to protect their Commerce, not to stifle it.

But to look back: It was a Saying as old as *Hesiod*,

*Ερπον δ' ἔδεν ὀνειδος**.

And to see how these peaceful Arts stood in Greece particularly. We must turn our Eyes from Sparta, a People of Soldiers, that bred themselves for the Field, and might read their own Features in their genuine Offspring, the Romans; who (as I have more than once in the course of these Papers observed, and of which I have stronger Proof to produce upon occasion, notwithstanding all that St. *Austin*³ says to the contrary) derived¹⁶ from thence; and through the whole Strain of their Politics stuck close to Spartan Principles, as well as preserved the original Plan of that Constitution.

But at Athens, on the contrary, Manufacture of all sorts was so set by, and Emulation in the good and useful Arts (without which the best Inventions would but wither) so well supported, that there were public Honours, Rank and Precedence attending those that excelled in Each.

Their Attention to Maritime Affairs in particular, as They aimed at Sovereignty upon that Element, must have contributed greatly to their Skill in Navigation. And We find all things that were relative to it, put in a good Posture accordingly. The many Laws, which are left us of that People, in regard to Imports and Exports; the fundry Immunities granted

* *Opus non est Opprobrium.*

to Merchants; the Constitution of a particular Jurisdiction for Contracts at Sea; the many Actions brought in these Courts still to be seen in some private Orations of *Demosthenes*; the Care they had of their Market, and the many Officers concerned in that branch of Justice; all these Reflexions, with many more that might be added, contribute to give us an advantageous Notion of that Trading People.

It was punishable there by Law to be of no Profession; at Sparta it was disreputable to be of any². And I have often wondered to find, even in some Writers of Antiquity, the Father's Profession objected to an Athenian, who made a Figure in the Republic as a matter of Reproach; when the Laws of the Country required it, and the Son himself, even in the Height of his Glory, was a Member of one of the Companies, and generally, without all Doubt, of the same with his Father. What could move *Valerius Maximus* to write thus,

Quam Matrem Euripides, aut quem Patrem Demosthenes habuerit, ipsorum quoque saeculo ignotum fuit. Alterius autem Matrem olera, alterius Patrem cultellos venditasse, omnium pene doctorum literae loquuntur³,

³ Valer. Max.
III. 4.

when *Theopompus*, who was likely to be a much better Judge of the Matter, says, He was of a good Family, or descended ἐκ τῶν καλῶν κα-

⁴ Plutarch. in
Demosth. γαδῶν⁴?

To guard therefore this Part of the Constitution, there lay a very severe Action against such as should reproach another, with retaling Goods, and keeping the Market.

Ενοκον εἶναι τῇ κακηγορίᾳ τὸν τὴν ἐργασίαν τὴν ἐν τῇ ἀγορᾷ, ἢ τῶν πολιτῶν, ἢ τῶν πολιτῶν ὀνειδίζοντά τινι⁵.†

⁵ Demosth.
adv. Eubulid.
pag. 636. Ed.
Cant. T. III.

The Founder of Rome, as We have seen, assigned the mechanical and the sedentary Professions to the Alien and the Slave: which very Persons, in the Athenian Polity, were, by the ordinary Course of Law, excluded. The Having nothing to do was cognizable here by the Civil Magistrate, as We have seen above⁶ in a very remarkable Instance: and Idleness was open to a public Action, which any Man might prosecute. And to shew the opposite Genius of these two Rival Cities, Sparta and Athens, let me add a little Story upon this very Subject:

⁶ pag. 60.

Ἡρώδης, Ἀθήνησιν ἀλόγος τινὸς γραφὴν ἀργίας παρὼν καὶ πυθόμενος, ἐκέλευσεν ἐπιδείξαι αὐτῷ τὸν τὴν ἐλευθερίαν δίκην ἡττηθέντα⁷. ‡

⁷ Plutarch.
Apophthegm.
Lacon.

* Ex bonis et honestis.

† Convicii crimine teneri jubent eum, qui quaestum in foro ulli Civium, seu Viro, seu Mulieri, exprobravit.

‡ Herondas, Athenis quodam Ocii damnato, quum adesset, idque inaudivisset, ostendi sibi petiit istum, qui tam liberalis criminis esset convictus.

Here

Here I would recommend ΤΗΣ ΕΛΕΥΘΕΡΙΑΣ, which I doubt not came from the Author's Hand, whoever that Author was. The name of the Action Δίκη ΕΛΕΥΘΕΡΙΑΣ, to stand like Γραφή ΑΡΓΙΑΣ. This last Stroke of Polity, with some other, was fetched from Aegypt, according to the Accounts of *Herodotus*⁸, and *Diodorus Siculus*⁹. That was the Corner of the World,⁸ II. 177. where Commerce began; and their near Neighbours, the Phoenicians,⁹ I. 77. were not only the first that put to Sea,

Οἱ πρῶτοι νήεσσιν ἐπερήσαντο θαλάσσης,
Πρῶτοι δ' ἐμπορίας ἀλιδινέος ἐμνήσαντο¹.*

¹ Dionys. II. 177. 907.

but (what was natural, as their Traffic carryed them to the rude and uncultivated) were the first Spreaders of Arts, and among the rest, of Letters; and were therefore, but erroneously, held for the Inventors. To which the Gloss Εκφοινίζαι. Αναλῶσαι, in *Hesychius*, was thought to allude. Thus we come by

Φοινικικὰ σήματ' αὖ Κάδμου². †

Thus

Φοίνικες δ' εὖρον γράμματ' ἀλεξίλοτα³. ‡

² Timo Sillographus apud Sextum Empiric. adu. Gram. Cap. 2.

And, to add no more Passages, out of many that might be, let me conclude with these, no contemptible, Trochaics, for the Time they were composed in.

³ Crit. apud Athen. I. 22.

*Primus Hebraeus Moyses exaravit literas.
Mente Phoenices sagaci condiderunt Atticas.
Quas Latini scriptitamus, edidit Nicostrata.
Abraham Syras, et idem repperit Chaldaicas.
Isis arte non minore protulit Aegyptias.
Gulphilas prompsit Getarum, quas videmus, ultimas.*

And since We have advanced so far, and found the Phoenicians to be Traders in Letters, as well as Manufactures, it will not be judged unreasonable, or out of Place, to insert here an Observation of a very considerable Writer, which helps us off with a Difficulty, as I always apprehended it to be, and yet *Tully* is a Voucher for the Fact:

Graeca leguntur in omnibus fere Gentibus: Latina suis finibus, exiguis sane, continentur⁴.

⁴ Pro Archia. §. 10.

The Romans, with all their Extent of Dominion, and all the Zeal They shewed for their Language, were very unsuccessful upon that Head. The Greeks set out before them, and, I might say, survived them. For We have now many Authors in Greek, who wrote with a considerable

* Qui primi navibus adtentarunt mare,
Qui primi commercium maritimum excogitaverunt.
† Phoenicia signa Cadmi.
‡ Phoenices autem invenerunt literas sermonis adiutrices.

Purity and Elegance, even after the other Language became, in a manner, Barbarous. It is not directly within the Compass of this Reflection, to add, that there is less Dissonance or Disagreement between the Greek of the First Ages and of the Last, between the Writers of the Fourth Century before the Christian Aera, and the Fourth or Fifth below it, than there is between two Roman Authors of the same Century. The Authors, that *Tully* saw, wrote *Osce*; and Some, that were very near seeing him, wrote almost *Gothice*. Those are not to be understood; and these but little to be admired. *Polybius*² has left behind him this Observation, that the Scholars of his Age could not, without the greatest Stretch of Attention, and then but hardly (I translate his Words *μόλις* and *ἐξ ἐπιτάσεως*, if the last be his Expression, as I think it ought to be) make out the Meaning of a Treaty, drawn up by the Romans, not many Ages before them. *Quintilian*³ acquaints us, that there were Priests who did not understand their own Service. We are assured by *Tully*⁴, that there were Lawyers who lived almost up the mid Period between him and the XII. Tables, who confessed they did not understand those Tables. And, to conclude with the Authority of *Festus*:

*Latine loqui a Latio dictum est: Quae Locutio adeo est versa, ut vix
ulla pars ejus maneat in notitia*

But, to what We shall attribute that wonderful Stability of the Greek Language, and its great Extent, was the more immediate Subject I entered upon. Now though much may be owing to a fine Temperature, and a good Constitution; to that happy Texture which preserves the Vigour, and burnishes the Complexion; that renders the Spring of Life, Florid, and blooming, and the Winter of it, as the Poet writes⁵, *Frosty, but Kindly* (and surely no Language can justify the Process of the Metaphor, so happily as the Greek) yet was this Success owing more to the Commercial Genius of the People that spoke it, than any intrinsic Consideration whatsoever of the Language itself. The Colonies and Factories, which They established both Eastward and Westward, engrafted their Language upon the Inhabitants of those Quarters, antecedently to the Roman Conquests, and then many Reasons concurred, why those Colonies should keep up what they now were possessed of. They found an Use, nay a Necessity, perhaps, in being acquainted with the Tongue of their *Correspondents*; and on the contrary, there was a Vassalage, or a Badge of Subjection, in taking up with that of the *Conqueror*. Thus *Hannibal* wrote, what He had to write, in Greek: and in the very Heighth of the Roman Glory, *Juba*, one of his Countrymen, is recorded to have been a very voluminous Greek Writer, and by the Character that remains of him, his Loss is very deplorable. The Author to whom I owned myself indebted for this Observation, justifies the Truth of it by an Event, which happened in the

Third

⁵ Shakesp. As
You like it.

Third General Council, held at Ephesus, which plainly shewed the Ascendancy that the Greek Language had over the Latin. When the Legate of the Bishop of Rome, *Celestine* I, had read his Letters; Letters, which were written in the Language of a Country, that had spread itself over the Face of the Earth, and was at that Time the Country of the World, the *ἄλλος τῆς οἰκουμένης* (for so it had been called⁶), it was moved by the Syn⁶ *Athen. I. 173* od to have them translated into Greek, in order to be understood

And this accounts for a Fact, of which yet very Few are apprized, *viz.* the great Stroke, which the Italian has in the Composition of the *English* Language. Before our Vessels found their Way to the East Indies by the Cape of Good Hope, all our Traffic with that Side of the Globe lay at Italian Markets. Our Lombard Correspondence has left many Remains behind it; the Tincture which We retain of the Language of Lombardy itself, is not the least express.

But to return: Many of the Romans themselves, or, at least, People connected with them, contributed to support this Universality of the Greek. The very History of Rome was indebted more to that Language than its own, both during the Republic and after. By what We learn from *Tully*, all the Ages of Rome down to his Time did not furnish out one Latin Historian. And he himself kept up the Fashion (whether Greek was the Polite Language, or the Learned) in writing the History of his Consulate in that Language. Nay farther yet, it was held, in a manner, necessary. For I find a Roman Historian, apologizing at the Beginning of his Book. for his moderate Skill in Greek. The Story is a pretty one, and the Rebuke that he met with from the surly *Cato*, was extremely just:

A. Albinus, qui cum L. Lucullo Consul fuit, Res Romanas Oratione Graeca scriptavit. In ejus Historiae principio scriptum est ad hanc sententiam: Neminem succensere sibi convenire, si quid in his libris parum compositae, aut minus eleganter scriptum foret: nam sum, inquit, homo Romanus, natus in Latio: Graeca Oratio a nobis alienissima est. Ideoque veniam gratiamque malae existimationis, si quid esset erratum, postulavit. Ea cum legisset M. Cato, Nae Tu, inquit, Aule, nimium nugator es, cum maluisti culpam deprecari, quam culpa vacare. Nam veniam petere solemus, aut cum imprudentes erravimus, aut cum compulsi peccavimus. Tibi, inquit, oro Te, quis perpulit ut id committeres, quod priusquam faceres, peteres ut ignosceretur?

⁷ Corn. Nep.
apud Gell. XI.

But *Cato* was an old Roman to Perfection, and hated the People of⁸ Greece and their Language beyond measure⁸. There ran a Prophetic Saying of his, *viz.* That Rome would be undone, when They took to Greek Learning. At the Age of Sixty He was induced to look into it, but to use the Words of *Pliny*, *Dicam de istis Graecis suo loco, Marce fili: quid Athenis exquisitum habeam, et quod bonum sit illorum literas inspicere non perdiscere; vincam.*

⁸ Plin. VII.
H. N. 30.

vincam. nequissimum et indocile genus illorum. et hoc puta vatem dixisse :
 7 XXIX. H. *Quandocunque ista gens suas literas dabit, omne corrumpet*⁷.
 N. 1.

I am to observe, that the Story of *Cato* and *Albinus* is reported with some little Variation by *Plutarch*⁸. There is indeed one Variation in it pretty considerable, and that is a remarkable Misnomer; for the Copies of *Plutarch* call him *Labienus* instead of *Albinus*. But here the Story follows:

* Add. Cic. in
 Bruto. §. 21.

Macrob. I.
 Saturn. Init.

Plutarch. in
 Vit. Catonis.

Suid. in Ἀλβίου
 Ποσειδίου.

* Plutarch. in
 Lucullo Init.

Ποσειδίου Λαβιήνῃ [Read ΑΛβίνῃ] γραψάντος ἱστορίας Ἑλληνισί, ἃ συγ-
 γράμην παρὰ τῶν ἀκροωμένων αἰτῆντος, ἐρωνευόμενος ὁ Κατῶν ἔφη δόξεν
 εἶναι συγγράμην, εἰ τῶν Ἀμφικλύωνων ψηφισαμένων ἀναγκαθεῖς ἔγραψε.*

This was the *A. Posthumius Albinus*, who was Consul with *L. Licinius Lucullus*, A. V. C. 602.

Among the Romans who wrote History in Greek, of which I have a large Catalogue by me, I find one *Lucullus*, not the Collegue of the last-mentioned, but the great One of that Name, his Grandson, whose Life is wrote by *Plutarch*; who engaging in a Design of writing the *Bellum Marficum*, cast Lots, whether it should be in Verse or Prose, in Latin or in Greek, and it turned up for Greek Prose¹.

Nothing was more common with the Romans, than to Translate and Epitomize in Latin, what these People wrote in Greek. Which Observation will lead us to many Discoveries in the literary History of Rome. At present I only observe, that *Lutatius*, a Roman Writer, is sometimes quoted for that, which others quote *Posthumius Albinus* for: of whom We have had some Discourse. *Albinus* was the Original, and *Lutatius* the Translator. And this may also help to reconcile the Accounts of *Quintus Fabius Pictor*, and other very early Historians, who are recorded by Some to have written in Greek, and by Others, in Latin.

* Suid. v. Ζη-
 νόβιος.

Steph. By-
 zant. v. Ἀλ-
 βίου.

The Fashion shifted under *Hadrian*, and, their Language beginning to droop, their own Authors were turned into Greek. *Sallust* was translated by *Zenobius*², who lived under that Emperor, and again, as it is said, by *Asper* the Grammarian.

And I would recommend to my Reader this Consideration, viz. Whether He is certain, that all the Roman Writers, that the present Age thinks themselves possessed of, are Originals; and to ask himself, if He does not recollect, that there may be Some, upon this Suggestion, which look like Translations—and bad ones.

I shall close these Reflections with two or three Notices of the great Tendernefs, which the Romans however had for their Language; how much the Honour of the Country seemed interested in it; and what Head They made against Those who disputed the Pass with it.

* *Postumio Albino historias Graece scribente, et veniam ab auditoribus orante, Cato subfannans dixit, veniam quidem fuisse concedendam, se scripsisset auctoritate Amphiclyonum coactus.*

It appears from *Cicero*³, That he suffered a Reprimand, for addressing the Council of Syracuse in Greek, and not in the Language of his own Country.

³ Verrin. Aft. II. Lib. IV. ad fin.

There is a remarkable Passage in *Suetonius*⁴:

⁴ Tiber. §. 71.

Sermone Graeco, quanquam alias promptus et facilis [Tiberius], non tamen usquequaque usus est. Abstinentque maxime in Senatu: adeo quidem ut Monopolium nominaturus prius veniam postulaverit, quod sibi verbo peregrino utendum esset: atque etiam in quodam decreto Patrum, cum Εμῆλημα recitaretur, commutandam censuerit vocem, et pro peregrina nostratam requirendam: aut si non reperiretur, vel pluribus, et per ambitum verborum rem enunciandam. Militem quoque Graece testimonium interrogatum, nisi Latine respondere vetuit.

The Emperor *Claudius*, as it is reported of him by the same *Suetonius*⁵, §. 16.

Splendidum virum, Graeciaeque provinciae principem, verum Latini sermonis ignarum, non modo Albo Judicum erasit, sed etiam in peregrinantem redegit.

There is a similar Story of Him in *Dion Cassius*⁶:

⁶ LX. 17.

Εν τῇ διαγνώσει ταύτῃ ἐπύθετο τῇ Λατίνων γλώσσει τῶν πρεσβευτῶν τινος, Λυκίᾳ μὲν τὸ ἀρχαῖον ὄνομα, Ῥωμαίᾳ δὲ γεγονότος· καὶ αὐτὸν, ἐπειδὴ μὴ συνῆκε τὸ λεχθέν, τὴν πολιτείαν αἰφείλετο, εἰπὼν μὴ δεῖν Ῥωμαῖον εἶναι τὸν μὴ καὶ τὴν διάλεξιν σφῶν ἐπιστάμενον*.

And yet the same Emperor would sometimes himself affect the Graecian to Ridiculousness; would deal out Scraps of *Homer* from the Bench of Judicature; would answer Embassadors in a continued Greek Oration (as a Passage in *Suetonius*⁷, is, I am persuaded, to be understood); and wrote eight and twenty Books in that Language⁸.

⁷ Claud. §. 42.

⁸ Sueton. ibid.

Claudius, besides his inconsistency with himself, must have been very blameable, if it be true, what I have here advanced from a cloudy Passage in *Suetonius*. It was entirely against the Roman manner, and the Dignity of that People, according to *Valerius Maximus*⁹, to answer in Greek.

⁹ II. 2.

Magistratus vero prisca quantopere suam P. que R. majestatem retinentes se gesserint, hinc cognosci potest, quod inter cetera obtinendae gravitatis indicia, illud quoque magna cum perseverantia custodiebant, ne Graecis unquam, nisi Latine, responsa darent. Quin etiam ipsa linguae volubilitate, qua plurimum valent, excussa per interpretem loqui cogebant, non in urbe tantum nostra, sed etiam in Graecia et Asia. Quo scilicet Latinae vocis honos per omnes Gentes venerabilior diffunderetur. Nec illis decrant studia doctrinae, sed nulla non in re

* De ea re quum cognosceret, legatum quendam, Lycium quidem origine, Romanum tamen factum, Latine interrogavit, ac non intelligenti quid quaesivisset, civitatis jus ademit, negans, Romanum jure esse, qui sermonem eum nesciret.

pallium togæ subjici debere arbitrabantur: indignum esse existimantes, illecebris et suavitæ literarum imperii pondus et auctoritatem domari.

And so the Law stood as to Judiciary Proceedings :

⁹ D. 42.1.48. *Decreta a Praetoribus LATINE interponi debent* ⁹.

Which must regard the Provinces ; for it would be idle, surely, to imagine the Praetors at home could want these Instructions. And yet This is questioned by some, indeed so far disputed, that some Lawyers, observing a good deal of Greek strewed up and down in the Books of Roman Law, and in the Decisions of the Judges, have ventured to apply this Direction to the Judges at Rome, and to interpret *Latine* in a very uncommon Sense, *viz.* to stand for the *Language that was understood by the Parties*, be it what it would.

When the Empire was settled in the East, the Law grew into Greek insensibly, and a Decree in Latin became an Indulgence, and a Dispensation. There is a Constitution of the Emperors *Arcadius* and *Honorius*

¹ C 7.45.1.2. for that purpose ¹.

Judices tam Latina, quam Graeca, Lingua sententias proferre possunt.

But it must be observed, that the People of Rome were not always so attentive to the Honour of their Language, as the Instances which I have produced above, are a Proof that they were once so. There was a Time when they were saving of it, and kept it to themselves in a very niggardly manner: so far were They from inculcating, and forcing it against the Stomach of their Dependants. Thus much, at least, is plain from a dark Passage in *Livy*, (whatever else may be gathered from it ²) that it was a Favour to impart the use of it.

² XL. 42.

³ A.V.C. 567. *Cumanis eo anno* ³ *petentibus permissum, ut publice Latine loquerentur, et praeconibus Latine vendendi jus esset.*

And I have some imperfect Memory of a League or Convention between the Romans and Carthaginians, drawn up in the Greek and Punic Languages, without taking any Notice of the Roman at all. But I have some reason to suspect my own Note, or my Author's Observation.

I flatter myself, that this general View of the Roman Commerce, together with those Reflections, which were in some Measure united to it, upon the Fate of the Roman Letters, will not be thought foreign to the Design I am engaged in. Every Branch of Roman Antiquity must find its Acceptance with a Reader of Roman Law.

The great Article of *SUCCESSIO IN BONA DEFUNCTORVM*, which I am to speak to next, one of the most interesting in the whole Compass of Law, deserves a Volume by itself; and indeed it hath met with many, I will not say of equal goodness. Yet in its Principle and Theory (if We take away some unnecessary Refinements) is perhaps the most simple and natural of any. There is a Necessity, that when one Generation is called off, and another rises up to take its *Station*, the Goods and *Furniture*, which attended that Station, must pass over somewhere. For the Person, who is gone, is no more able to enjoy the One, than He is to maintain the Other. The Question is, *Where shall they go?*

Shall they revert to the common Stock, from which all Things were originally taken at the General Dividend, when *Sempronius* took out his Share, and *Titius* his? The Roman Law, I think, seems in some measure, to contemplate the matter in that Light. For in their Apprehension of it, the *Bona Defunctorum*, at least till the Heir accepts or enters, are *naturally* nobody's: The *Hereditas Jacens*, is *Res Nullius*⁴, and, in Con-⁴ Above, pag. sequence of that Doctrine, is not subject to the Idea of *Furtum*, if any⁴ D. 1. 8. 1. pr. one should invade it: For *Furtum* supposes Property, indeed it cannot⁴ 24. 13. 5. exist without it. Upon which Account the Subtilty of that Dispensation, *viz.* the Roman Law struck out the Fancy of *Actio expilatae Hereditatis*⁵: a Method to recover what was *lost*, though they could not, or⁵ D. 47. 19. 2. would not, consider it as *stolen*. And yet, at other times, the Inheritance¹ l. 6. eod. is raised to the State of Personality, and distinguished with the Title of *Domina, defuncti locum obtinens*⁶.⁶ D. 28. 5. 31.

But surely the same Motives (and they were many and good ones) that led Mankind to a Distribution at first, recommended also the Perpetuity of it, when it was once introduced. If it was convenient for one Generation of men, it was no less so for the next. Add to this, that the *Accessio Industrialis* must now be taken into the Account. For if one Reason for this great Separation was (and it doubtless was so) to call out the Diligence, and find Employment for the Activity, of Mankind: and if *one Talent* taken out of the general Heap shall have *produced Ten Talents*, there is no Reason for the common Stock to challenge (at least) the Nine; which upon my Hypothesis were not originally in it, as they could never have existed but upon the Score of Industry, or, in other words, upon the Introduction of Property. *Sempronius* therefore, when he took his Assignment together with what he could *make* of it, took it not out in his own name only, but in the name of Others to whom it might descend after him. For the fluctuating and successive Condition of Mankind leads us to consider no one Man collected in himself as a Circle, with his Possessions in the Centre, (though We are taught by melancholy Experience, that some Men have worked themselves into a Habit of thinking so) but to contemplate every Individual as one Link of a chain, that holds up a great and a general System. The Scheme of Providence readily and ea-

filly Points out to Mankind, what might indeed have been the Allegory of an old solemnity among them,

³ Lucret. II.
78.

*Vt quasi cursores Vitæ lampada tradant*³.

The common Stock therefore, if this be true, cannot claim the Right of Resumption, but the Property of the Deceased becomes the Property of some Survivor. And it will be sufficient here to say in general; (I shall consider it more minutely presently) that it must be conveyed either to Those who may have some Right to demand it by the order of Nature; or Those, to whom the last Possessor had a Right to consign it, by some Agreement of Mankind. The Wit of Man cannot discover a third Direction, or any other possible Method of proceeding.

But here it may be suggested, that this Reversion into Common may sometimes be the case, whether we chuse to have it so, or no. For there may be no body to claim, and no body to whom the Owner has given. A Man may have no Representative, or, in other words, may be the last Man of his Family: may leave Goods behind him, and on the one Hand, neither any of his House to enjoy them, nor, on the other, any Declaration of his Will, in respect to that Direction he would have them conveyed in. Which being the two only Methods left, according to my System, they must of necessity revert to the Stock they were originally taken from.

Now Experience informs us, that such Cases may happen; my Reader perhaps will not be displeased, if I take this opportunity to lay before him, what Conceptions the Antients formed of them, when they did. There is a striking passage in *Homer* of an old Man, who lost his Sons before Troy, and had no-body left to inherit his Substance.

Εἷ δὲ μετὰ Ξάνθον τε, Θώνῳ τε Φαίνοπος υἱε,
 Ἀμφω τηλυγέτω· ὃ δ' ἐτείρετο γήραϊ λυγρῷ,
 Ἰὶδὼν δ' ὅς τέκετ' ἄλλον ΕΠΙ ΚΤΕΑΤΕΣΣΙ ΛΙΠΕΣΘΑΙ.
 Εὐθ' ὅγε τὸς ἐνάριζε, φίλον δ' ἐξαίνυτο θυμὸν
 Ἀμφοτέροιν· πατέρι δὲ γόον ἔκ κήδεα λυγρὰ
 Λαῖω, ἐπεὶ ὃ ζῶντε μάχης ἐκνοσήσαντε
 Δέξατο. ΧΗΡΩΣΤΑΙ ΔΕ ΔΙΑ ΚΤΗΣΙΝ ΔΑΤΕΟΝΤΟ⁴. *

* Homer
Iliad. E. 152.

It will be proper here to observe, that this Solitude, with the first Ages, was looked upon as a very calamitous Circumstance, and one of the first things that could befall them. To dye without Representation; no Re-

* *Young Xanthus next, and Thoon felt his Rage,
 The Joy and Hope of Phaenops' feeble Age:
 Vast was his Wealth, and these the only Heirs
 Of all his Labours, and a Life of Cares;
 Cold Death o'ertakes them in their blooming Years,
 And leaves their Father unavailing Tears:
 To Strangers now descends his heavy Store,
 The Race forgotten, and the Name no more.*

POPE.

lative

lative to close their Eyes, or support their Memory; to be cut off from the Land of the Living, as it were, Root and Branch at once, was a very afflicting Consideration, and was therefore improved into a very common, and a very awful, Form of Imprecation. Nothing was so frequent in their Inscriptions, as

QVISQVIS HOC SVSTVLERIT VLTIMVS SVORVM MORIATVR.

And under this Apprehension, what a Monster must *Tiberius* have been, who was prevented only by his own Death, from clearing off the whole Stock of his Relations before him?

*Nec abhorret a vero: namque identidem felicem Priamum vocabat, quod superstes omnium suorum exstitisset*⁵.

⁵ Sueton. *Tiber.* § 62.

The melancholy Situation of the old Man in *Homer*, was the Complaint also of the Patriarch *Abram* before him.

And Abram said, Lord God, what wilt thou give me, seeing I go childless, and the Steward of my House is this Eliezer of Damascus?

And Abram said, Behold to me Thou hast given no Seed, and lo, one born in my House is my Heir.

*And behold the word of the Lord came unto him, saying, This shall not be thy Heir; but he that shall come forth out of thy own bowels, shall be thy Heir*⁶.

⁶ Genes. XV.

Now it must be observed, that these Passages of Antiquity, this of the Patriarchal Aera, and that of the Heroic, have an Use, even beyond that Purpose, for which I produced them. These *desolate Heritages*, as the Prophet calls them⁷, are prevented both in the Jewish and the Graecian System, from falling to the Ground, by a Substitution worth our Notice. For it may not be improper to observe, that, even in very remote Antiquity, when Property was young, and an undivided Community almost before their Eyes, perhaps in the Memory of some among them; I say, that even here Provision was made to prevent this unwelcome Lapse, this incommodious Devolution. In the case of *Abram*, We can perceive a kind of Natural or Domestic Law prevailing, that for want of Heirs to succeed into the Inheritance, the *Oikosevās*, the *Vernae* of the Family, should sustain the House of their Master. That I think can be gathered from the Turn and Spirit of the Context. And as for the passage of *Homer*, We may either consider *Phaenops* to have had no Heirs of his Body left; and then *Χηρῶσαι* will signify, as some have apprehended it, his Collateral Relations, those Subsidiaries of a Lineal Descent, the *Propinquitate juncti*: Or, if We consider him to dye without Heirs General, then the same Word, as others have also expounded it, will signify those Officers in a State of Community, upon whom the Care, and per-

²⁻⁴

⁷ Isaiah, XLIX. 8.

perhaps the Distribution, of these *Hereditates Caducariae*. devolved by Law and public Consent.

But put the case, that these Estates should actually revert into the Common Stock, which yet we find Antiquity so averse to. This by no means affects the point I was contending for, when I set out upon these Considerations. I maintained that the general Sense of Mankind had wisely concurred in keeping the Goods of the World in a State of Appropriation, as soon as ever that Mode of Enjoyment was established; and I am little concerned, if now and then a case of *Necessity* should turn up, where that Scheme would be impracticable. My general System is not at all affected by it.

*Nam ad ea potius debet aptari Jus, quae et frequenter et facile, quam quae perraro, eveniunt*¹.

¹ D. 1. 3. 5.

Suppose it therefore necessary, in these rare and extraordinary cases, that None should enjoy, where None could claim: My Hypothesis still continues firm, that those Possessions would still have continued appropriated, if any body was left with a Title to appropriate them. The Property therefore of private Men, for want of Heirs, would regularly subside into that general Community, from which it was originally distinguished. It is granted. But because that Community is entirely abolished, and removed from all manner of Practice, it cannot revert even there, but go back only as far as it can. And that is considered thus: The *Dominium Eminens* shall be Heir to the *Dominium Vulgare*; and this constitutes the Idea of what the Ancient Law knew by the Name of *Caduca*, and the more Modern by that of *ESCHEATS*. For with Us, the Goods of these who have no Heirs to enjoy them, fall either to the Lord of the Fee, in right of his Seignory: or to the Crown, in virtue of its Prerogative. This was a well known practice with the Romans, whose Emperors had an Officer, exactly like our Escheator; who was to have an Eye to such Devolutions, and maintain the Interest of the Prince in this Right of Succession: I find some mention of this Affair in *Cassiodorus*².

² in Form.
Comit. Privat.
VI. Var. 8.

Canonicarios dirigis, possessores admones, et cum aliis judicibus non modica jura partiris: caduca bona non finis esse vacantia: ita quod usurpatio potuit invadere, Tu fisco nostrum facis justis compendiis obtinere.

³ V. Var. 24.

And again³.

Caduca bona fisco nostro competere legum cauta decreverunt.

And also some notice of the Officer in these Inscriptions:

L. FABIO

L. FABIO L. F. OVF
AVITATO
PONTIANO
PROC. PATRI
MONI
DOMITIANI AVG.
EVOK. AVG. HER
PROC. CADVC. BIS
L. FABIUS SERENVVS
II VIR. D. D.
L. D. D. D.⁴

⁴ Fabrett.
pag. 197.

DIS MANIBVS SACRVM.
D. LABERI. D. F. SERGIA
LATINI VET.
PRAEF. FABRVM
VIX. ANN. LXIIX.
D. LABERIVS SECVNDVS
PROCVR. CADVCORVM
FRATRI SANCTISSIM.
POS.⁵

⁵ Id. pag. 198.

These Things being premised, I come now to consider more minutely how Goods and Possessions are transmitted in the common Course of the World: of which, I observed before, there were but two possible Ways to be imagined.

The One is called by the Name of *LEGAL SUCCESSION*, viz. when the Goods, Possessions, Property, *etc.* of the Person deceased, descend in the Channel of Blood, according to the Order of Proximity.

The Other is known by that of *TESTAMENTARY SUCCESSION*; where that exact Order does not necessarily prevail, but the Estate of the Deceased is transmitted according to some Rule or Direction, some Signification of the Will and Pleasure, which the Deceased has thought proper to leave behind him.

Of these Two, the *LEGAL Succession* is the Rule, and the *TESTAMENTARY*, the Exception. In other Words, Nature, the Voice of Mankind, the Order of public Society, and the Interests of private Families, direct the Former, as a Matter of Natural Law: the Other depends upon the arbitrary Will of Man, and is merely the Result of Positive Law or Institution. So much so, that even the Succession of Proximity

mity of Blood depends, in some measure, upon the Human Act; that it can be deemed the Law of Nature Hypothetical only; for Property, in which it is grounded, is, in the System of the Absolute Law of Nature, a Thing not understood.

This Position being, in some degree, the Basis and main Principle of Hereditary Successions, it may deserve a little farther Notice.

It is plain, that the Romans considered the Matter in this Light, when they called² the Heirs of a Man's Body, emphatically, *Sui Heredes*, his natural Heirs; esteemed them, even in the Father's Life-time, a kind of Partners, or *Com-Domini*; and their Succession a kind of Continuation only:

In suis Heredibus evidentius apparet Continuationem Domini eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi Domini essent, qui etiam vivo patre quodammodo Domini existimantur. — Itaque post mortem patris, non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur; hac ex causa, licet non sint heredes instituti, Domini sunt³.

³ D. 23. 2. 11.

Sui quidem Heredes ideo appellantur, qui domestici heredes sunt, et vivo quoque patre quodammodo Domini existimantur. Vnde etiam, si quis intestatus moritur, prima causa est in successione liberorum. Necessarii vero ideo dicuntur, quia omnino sive velint, sive nolint, tam ab Intestato, quam ex Testamento heredes fiunt⁴.

⁴ J. 2. 19. 2.

Again. The Sense of that People is discovered by the many Laws *Furia*, *Voconia*, *Falcidia*, enacted to restrain immoderate Bequests, which after the Introduction of Wills, were found to prejudice the Heir at Law. These were so many Comments upon the XII. Tables, which spoke a general Language,

VTI QVISQVE LEGASSIT SVAE REI ITA IVS ESTO.

They were to correct the Errors of such, as thought their Power unlimited, and to acquaint them, that there was an Heir in the Estate, by the Ordination of Nature, who had a Right in it not to be neglected. The *Lex Furia* was a *Plebiscitum*, possibly A. V. C. 570. enacting that no Devisor should bequeath away from his Heir at Law *supra mille asses*: and a Penalty lay upon the Legatee for receiving it. The *Lex Voconia*, A. V. C. 584. when the former Law was eluded, enacted, that no Legatee should receive more than the Heir. The *Lex Falcidia*, under *Augustus*, which appears to have obviated all the Difficulties that the other lay open to, and sufficiently to have answered the Purposes of its Author (as We may learn from a Passage in *Dion Cassius*⁵) secured to the Heir a Fourth of the Estate, by restraining the Testator from bequeathing in Legacies *ultra Dodrantem*. See this Matter stated and discussed in *Theophilus*⁶ and *Wieling*⁷.

⁵ XLVIII. 33.

⁶ J. 2. 22. pr.

⁷ Lect. Jur.

Civ. II. 17—

³¹.

Moreover: the Condition of the Heir by Blood is much more valuable, and, what I have to maintain, prior in Right and in Order, than the Condition

dition of the Heir by Testament, from this Consideration, *viz.* That if a Man leaves his Estate by Will, where it would have descended by Law and the Course of Nature, That Heir seems to be in, by two Rights, but He shall act or hold by one only, *viz.* the Latter.

To proceed: The *Querela Testamenti inofficiosi*, of a Will made *contra Pietatem et Naturale Officium*, with the Romans, is a farther Proof. This was a Process at Law to set aside some unnatural and unreasonable Dispositions of a Testator. For the Indulgence of a Will (I call it so now, I will prove it so presently) was not unlimited, nor left at large to riot against all Sense of Blood, and the Restraints of natural Affection. The Romans therefore required not only some Foundation for Disinheritance, some reasonable cause, before they would suffer it to take place: but moreover would give the preference to a Will defective in Point of Form, where the Heir by Blood was called to the Succession, over another more regular in Form, and more recent in Time, which transmitted the Estate to a Stranger.

There is another Consideration, that raises the Condition of the Heir by Blood, very high; and that is this. He is of Necessity, the Other only precarious and accidental. Mankind could not go on without the One, but might without the Other. Or take it thus: When the World seemed to agree, that Estates should not revert again into Common, there was a Necessity in that Community (whether Family or City), that these should descend in some Order, and Method; and for the peace of that Community it was proper, that such Order or Method should be perpetual. What That should be was not hard to discover. For Providence foreseeing, that Man would settle in this Situation, and act under this Distribution, implanted a Tendernefs in almost every Man's Constitution; and taught him, that Those to whom he gave Birth, had a fair Title to his Means of Support.

Οἷσι δὲ τέκνων ἔστιν ἐν οἴκοις
Γλυκερὸν βλάβημ', ἔσορῳ μελέτῃ
Κατατρυχομένους τὸν ἅπαντα χρόνον,
Πρῶτον μὲν ὅπως θρέψωσι καλῶς,
Βίον τ' ὁπόθεν λείψωσι τέκνοις.*

⁹ Euripid.
Med. 1093.

Now Nature has not only given these quick Sensations for the interest of those who are so near us, but has proportioned her Touches in regard to Those who stand at a greater distance. Mankind therefore in general put themselves upon this Scent, when they directed the Laws of Succession.

* Quibus autem liberorum est in aedibus
Dulcis propago, eos vides cura
Maceratos per omne tempus:
Primum quidem ut bene educeant,
Deinde quo pacto rem familiarem liberis relinquant.

They made this the Rule, not only before Testaments were in use, but to this Principle they had again recourse, when last Wills or Testaments were either denied, as they were not allowed in all cases; or neglected to be made use of, as the Nature of them was not Preceptive, but Permissive. So that the One is necessary, and the Order of Providence: the Other only an Act of Human Indulgence, or accidental Provision, not allowed in all Cases, or all Countries. The Former might have been a sufficient and adequate Method of Conveyance, if Wills had never been introduced: and it must be the Scheme at last to adjust Successions by, when the Other either can not, or, is not, exerted.

In this Case therefore, *viz.* in default of a last Will or Testament, or where that last Will and Testament shall have no legal Effect, the Law, as I observed, has recourse to the Order of Nature, which is called *Successio ab Intestato*. Now This, as it has the Appearance of a Subsidiary Measure, may, in the estimation of vulgar Philosophy, seem only a secondary Consideration: and indeed other Philosophers, besides the vulgar Ones, have contributed to propagate the Mistake, by considering this Doctrine of Inheritances, primarily and principally engaged in the View of last Wills and Testaments: and a subordinate Concern only, shewn for that Direction which seems to come in aid of the other, *viz.* the *Jus Succedendi ab Intestato*. The Emperor himself seems to have considered it so. For in his Second Book he treats of Testaments, and in his Third he comes to speak of Intestacies. Many Lawyers have treated it in the same Light, though it might probably be in condescension to vulgar Capacities, and to popular Apprehensions, when they gave their Reflections this Order and Disposition.

Be it also observed, that *Rule* and *Exception* are necessarily circumstanced in this manner: *viz.* The Rule is *prior* in its own nature, and Exception is what may come after, or not, accidentally. So that the Rule is in a manner suspended, when the Exception takes place; and again revived, whenever that Exception may happen to be removed. My Reader will apply this to the case before us, and judge whether I am maintaining a reasonable Hypothesis, or Those, who maintain the contrary.

The Antients also, who looked into the System of Nature, saw the Right of Succession in the Light I am endeavouring to recommend. The Goods of a Man were considered by *Plato*, not as his own, but of the Family He belonged to; which was the Roman Doctrine of *Suitas*: and till the Time of *Solon*, No body in that State, was empowered to make a Will or dispose of his Goods at Pleasure:

* Εὐδοκίμησε δὲ καὶ τῷ περὶ Διαθηκῶν νόμῳ. ΠΡΟΤΕΡΟΝ ΓΑΡ ΟΥΚ
ΕΞΗΝ, ἀλλ' ἐν τῷ γένει τῷ τεθνηκότος ἔδει τὰ χρήματα, καὶ τὸν οἶκον
κατα-

* Jam probatur Lex ejus Testamentaria. Etenim antea non erat Jus testamentum condendi, sed familie defuncti pecunia et hereditas relinquendae erant. Hic liberum fecit, non exstanti-

καταμένειν· ὁ δ' ὦ βέλειαί τις ἐπιρέψας, εἰ μὴ παῖδες εἴεν αὐτῷ, δῆναι
τὰ αὐτῷ, φιλίαν τε συγγενείας ἐτίμησε μᾶλλον, ἢ χάριν ἀνάγκης· ἢ
τὰ χρήματα, κτήματα τῶν ἐχόντων ἐποίησεν².

² Plutarch in
Solone pag.
196. Ed.
Bryan.

And let me add a similar Passage to this from *Demosthenes*³.

Εἰ γὰρ ὁ μὲν Σόλων ἔθηκε νόμον, ἐξεῖναι δῆναι τὰ ἑαυτῷ ὅτῳ ἂν τις βέλη-
ται, εἰ μὴ παῖδες ᾧσι γνήσιοι, ἔχ' ἢ ἀποσερήσῃ τὰς ἐγγύτατα τῷ γέ-
νει τῆς ἀγχιστείας, ἀλλ' ἵνα εἰς τὸ μέσον καταθεῖς τὴν ἀφέλειαν, ἐφά-
μιλλον ποιήσῃ τὸ ποιεῖν ἄλλος εὖ——*

³ Adv. Le-
ptin. pag. 41.
Tom. III. Ed.
Cant.

We find the same Account of this plenary Indulgence introduced by
Solon, in many other Passages of the Greek Writers, *Demosthenes*⁴, *Isaeus*⁵,
and others.

⁴ c. Steph. B.
⁵ de Philote-
monis Here-
ditate, pag.
57. Ed. H. S.

When I quoted *Isaeus*, I would suggest to my Readers, that I mention-
ed an Author upon many Accounts very valuable, but upon none so
much, as of the great Light He is capable of throwing upon the Question
before us, *de Jure Hereditario*; a Subject in which the Orations that are
left of him, most remarkably abound.

And when I said the *plenary* Indulgence of *Solon*, it must not be imagined,
that for Want of Heirs Male, He left it without any Restriction whatso-
ever. There remains enough in the Greek Authors to shew, that He insist-
ed upon many Requisites, which should go towards supporting the Vali-
dity of a Will. I need not mention what is so very obvious, the Sufficiency
of Judgment in the Testator, that Circumstance *Sanae Mentis*, the Use of
Reason, without which all Human Acts must of necessity be defeated of
their Power and Obligation. But I mention this the rather, because in the
Notices left us of the Graecian Forms of Bequeathing, it is entertaining
enough to observe, how Their Practice corresponds with Ours:

Αλλὰ μὴν ἢ ὁ νόμος——ἐκ εἰάν τις ΔΙΑΘΗΤΑΙ μόνον, κυρίας εἶναι κε-
λεύει τὰς διαθήκας, ἀλλ' εἰάν, ΕΥ ΦΡΟΝΩΝ⁶.†

So *Lyfias*⁷.

Αὐτὸς γὰρ ἐν τῇ νήσῳ ὧν ΕΥ ΦΡΟΝΩΝ ΔΙΕΘΕΤΟ.†

⁶ Isaeus de
Hered. Ni-
costr.

⁷ de Bonis A-
ristoph. p.
346. Edit.
Lond.

On a Marble Tablet, now at Venice, there is a Record of a Greek
Will, in eight Columns⁸, which sets out thus,

⁸ Gruter.
CCXVI. seq.
Maffei Mu-
seum Veron.
XIV. seq.

*bus liberis, cui visum esset, sua donandi, amicitiamque propinquitati, et gratiam praetulit ne-
cessitati; pecuniamque revera in potestate habentium locavit.*

* Nam cum legem Solo tulerit, licere, cui legitimi filii non sint, quem libitum sit heredem in-
stituere, non ut genere proximos jure propinquitatis fraudaret, sed ut, utilitate in medium pro-
posita, efficeret, ut homines inter se certarent beneficiis——

† *Veruntatem Lex non solum, si quis testetur solum, jubet testamenta esse rata, verum etiam,
si sanae sit mentis.*

‡ *Ipsa enim, dum in insula manebat, sana mente legavit.*

PROPERTY.

ΕΠΙ ΕΦΟΡΩΝ ΤΩΝ ΣΥΝ ΦΟΙΒΟΤΕΛΕΙ
 ΤΑΔΕ ΔΙΕΘΕΤΟ ΝΟΟΥΣΑ ΚΑΙ ΦΡΟΝΟΥΣΑ ΕΠΙΚΤΗΤΑ
 ΓΡΙΝΝΟΥ ΜΕΤΑ ΚΥΡΙΟΥ ΥΠΕΡΕΙΔΟΥΣ ΤΟΥ ΘΡΑ-
 ΣΥΛΕΟΝΤΟΣ ΣΥΝ ΕΥΑΡΕΣΤΟΥΣΑΣ ΚΑΙ ΤΑΣ ΘΥΦΑ-
 ΤΡΟΣ ΕΠΙΤΕΛΕΙΑΣ ΤΑΣ ΦΟΙΝΙΚΟΣ. ΕΙΗ ΜΕΝ ΜΟΙ ΥΓΙΑΙ-
 ΝΟΥΣΑΙ ΚΑΙ ΣΩΖΟΜΕΝΑΙ ΤΑ ΙΔΙΑ ΔΙΟΙΚΕΙΝ ΕΙ ΔΕ ΤΙ ΚΑ-
 ΓΕΝΗΤΑΙ ΠΕΡΙ ΜΕ ΤΩΝ ΑΝΘΡΩΠΙΝΩΝ ΑΦΟΛΕΠΩ Cetera.

This last Part has been misunderstood by some, and mistranslated. *Vtinam mihi liceat salvae sanaeque de bonis meis disponere.* Absurd! to wish in this Line, what was laid down for a Fact in the foregoing. *Maffei* took it right. Let it run thus:

I Epicteta, being of sound Mind and Memory, do make my Last Will and Testament in the Manner and Form following:

My first Desire is Life, Health, and Strength, to enjoy what is given me. But when I am called away, I dispose of those Goods, as below, viz.

The whole is a singular Curiosity, and of all the Remains I ever met with of this kind, contributes most to the Knowledge of the old Practice, in the Article of *Testamenti-factio*. And upon this Occasion, let me suggest to my Reader an Account of what Treasures are left us of this Sort. In *Diogenes Laertius* We meet with the Wills of several of those Philosophers, whose Lives He is recording, as of *Plato, Lyco, Aristotle, Theophrastus, and Epicurus*. There is a Copy of a Greek Will produced ¹ also by *Demosthenes*¹, from which, and from another Passage of the same Author², it appears, that the Athenians had a very singular Practice of *bequeathing their Relicts* to their particular Acquaintance. The Dowagers of Great Britain, I dare say, think it more reasonable to chuse for themselves. There are several Forms of old Wills also to be met with in the Books of Inscriptions, as *Gruter* and *Fabretti*. And the Writers *de Re Diplomatica*, Those that deal in Chartularies, Records, and the Monuments of the lower Ages, will furnish many more. Above all We find this Point considered in a great Extent by *Barn. Brissotius*, in the Seventh Book of his Work *De Formulis*. So necessary a Writer to accompany the Study of Civil Law, not only in this Article, but in all, is scarce to be found among the Many, that have contributed their Assistance towards forwarding this useful Part of Learning.

But to recover the Argument I was engaged in. We observed that the Rule of Nature calls to the Succession, such as seem by their Propinquity and the Union of Blood to have a just Demand to it: We observed likewise, that by what we can gather from the Greek Writers, Things continued in this Posture, till the Legislation of *Solon*. How it stood with the Romans, I find a great Subject of Dispute: Whether the Right of making a Will was antecedent to the Laws of the XII. Tables, or first to be found there?

¹ c. Steph. α.
 n. 40. Ed.
 Benen.
² c. Aphob. α.
 init.

there? Whether the *Decemviri*, in their Constitution (if their Constitution should be allowed to be the Original of this Power) copied the Principles of Athens, or of Sparta? With many more scrupulous Questions, which generally attend a Case of so remote Antiquity.

I shall be excused a minute and particular Examination of these Difficulties. For the Writers upon the XII. Tables are not only many, but, some of them, very sufficient: and the Nature of their Engagement seems to recommend to them a clear Disquisition of a Question, that stands so full before them. For it cannot be denied, that We find, I had almost said frequent, Mention of Wills and Testaments in the Roman History, antecedent to the Legislation of the *Decemviri*, if the History of that Period can be depended upon. For my own part, I am often tempted to look upon the *Seven Kings of Rome*, as I do upon the *Seven Champions of Christendom*.

I may observe at least, that the Disposition of Law in the XII. Tables, upon the Article of *SVCCESIONS*, does not seem to flow from the Athenian Manner, for indeed it is founded, in a great Degree, upon a direct Contradiction to it. To instance in a Case, which is not indeed Succession itself, but bears the nearest Relation to it: In the Greek Law, *Solon* did not care to trust the Guardianship of Orphans with the next Relation, upon a Principle of Jealousy, *viz.* because they were the next in Succession; and therefore He threw it upon the Magistracy to make the Appointment. On the contrary, in the Roman Law, the next Relation was called to this Office, merely because *He was* the next in Succession, *ut ad quos Lucrum Hereditatis pervenire poterat, ad eosdem pertineret Onus Tutelae*. What could be so opposite? Other Lawgivers in the mean time (to make an *Obiter* Observation) directed the Guardianship of the *Estate*, to the Relations on the Father's Side, who were, as I may say, in the Entail, and consequently, would administer it watchfully and discreetly: but directed the Guardianship of the *Person*, to the Relations on the Mother's Side, who would probably be more tender of the Orphan, as they had no Interest in the Succession. This was a Caution which betrayed some little Distrust of Human Nature. Perhaps the Insinuation of *Plato*³ betrayed somewhat more. He recommended the two next Relations on either side, and set over them a Fifth, an indifferent Person, a Friend to the Deceased, who would be a Check to both Parties, and, as Occasion called for it, a common Umpire between them.

But whoever struck out the Thought of Testaments, and the Right of Disposition in the Person possessing, which made his Will to stand in the place of *Law*, for so the *Romans* always considered it; it is a measure, which has prevailed in almost all States universally, and has opened a great Scene in all Systems of Laws, by settling the Nature, Rules, Circumstances, Solemnities, and Obligations of those Acts; by describing, who has a Right to make them, and who has a Title to be benefited by them:
by

³ XI. de Legg. pag. 924. Ed. H. S.

⁴ Above, pag. 64.

by settling their Form, by adjusting their Limits, and prescribing the necessary Conditions for their Sufficiency : as well in regard to the Circumstance and Capacity of those that make them, as the Number and Quality of those that attest them. But These, and many other, Considerations attending the Rules of Last Wills and Testaments, abundantly confirm the Hypothesis I am concerned in, which was to shew the Subordination of this Disposition of Law, to that Succession which springs from Blood ; and to testify, as well as recommend, the Caution which is necessary in substituting the distribution of Human Will to what I may call the Distribution of Nature. For indeed it has been a great Point with all Civil States, and it has considerably increased the Volumes of these Laws, to guard against the Frailties of Mankind, and to conduct these Dispositions of private Judgment by the Rules of public Expediency.

The State of Rome accepted this Indulgence, or Privilege, with an uncommon Satisfaction. It was agreeable to their Notions of a Domestic Empire, which made, or left, every Father a little Sovereign, and his Family almost a distinct Jurisdiction. His Right therefore of Disposing, though in some respects confined, had a freer Scope than was allowed it in other Constitutions both before and after : and the Rules of Testamentary Succession are not only more widely extended, but more wisely considered, in the Books of Roman Law, than in the System of any other People besides.

It is from this predominant Article in the *Jurisprudentia Romana*, that Many who have been bred up in it, have given the *Jus Testamentarium* an unwarrantable Precedence. And moreover the general Consent of Mankind in embracing this Method of conveying their Substance, inclined some Roman Lawyers, and some Civilians after them, to consider the *Testamenti-factio*. as a Principle of the *Jus Gentium*. I have in a former part of this Treatise^a, guarded against a very easy Mistake, which was confounding the *Universality* of a Practice, with the Notions of its *Natural* Obligation. I observed that Some things might be Natural, which yet had not an universal Influence : and Others again might prevail with the general Sense of Mankind, which yet in their own nature might be arbitrary and accidental.

^a Above, pag.
233.

This Universality, I see, has been a Stumbling-block to Many that maintain the contrary Hypothesis to mine ; to Such, who assert that the Testamentary Succession is grounded in Natural Law, and what is called the Legal One, is only *Successio ex Testamento presumpto*. Who was that ABLE INSTRUCTOR, they ask, that set all the World upon the Work, and connected together Ages and Countries in the general Principle *Testamenti condendi* ? To whom I would reply, it was the same *able Instructor*, that taught Mankind the expediency of a public Standard for the ease of Trade ; and spread over the Earth, wherever those Minerals were to be had, the use of Silver and Gold for that purpose. Must the Application of Silver and Gold there-
fore

fore to the Value of Goods, be fetched from the fundamental and deep Researches of Natural Law? Or shall I not rather keep clear of so glaring an Absurdity, by contenting myself with this Persuasion? *viz.* That some Human Institutions have been so successful, have been so reasonable when introduced, that Reason itself alone appeared to introduce them. And so it might indeed; it might suggest them to *One* or more positive Law-givers; And the Proof of their general Expediency would recommend the Practice to *Many*.

But even this Universality is recent in point of Time. I mean so recent, that there has been a Time when Wills were not known, and yet Successions maintained. The Simplicity of the first Ages knew them not: We have seen That in some measure illustrated from the early History of Greece and Rome. (To spare the Roman,) among the Greek Writers there are Authors of whose Genuineness I have no doubt, and of whose Judgment I have no Question; who knew the Constitution of their Country, as well as any, and were at no great distance of Time from that great Man that plan'd it (One of whom acquaints us himself what that Period was⁶) I say, these Writers constantly speak of this Article in their Law, the *Jus testandi*, as Those would do, who entertained no Question of its Recency. And it is not reconcileable to common Sense, that Writers of this Class should daily and publicly pronounce thus of a Practice, which yet was known to all the Nations round them, and to all the Ages before them. Indeed the farther back We go into Antiquity, the more We are confirmed in this Opinion. *Tacitus*, in his account of the ancient Germans⁷, writes thus:

⁶ Demosth.
w. w. c. c.
pers. pag.
201. T. II.
Edit. Cant.

⁷ §. 20.

Heredes Successoresque sui cuique liberi, et nullum Testamentum.

But it may seem odd to some, if what I have been saying should gain any Credit, why that Succession which We give to the Principles of Nature, should be called the LEGAL Succession; which seems a much more proper expression for that which I contend to be derived from Civil Institution. It is called *Legal* no doubt, and the Heir who comes in by Proximity, is called also the *Heir at Law*, *sc. ex priore et potiore jure*; and stands to distinguish between the *Law of Nature* and the Will of Man. The other may not unfitly or improperly be called a *Legal* Succession also: for that is confirmed by another Law, the *Law of the State*: which brings me to conclude this Dispute with that very pertinent Law of *Vlpian*⁸:

⁸ D. 50. 16.
130.

Lege obvenire hereditatem non improprie quis dixerit et eam, quae ex testamento defertur: quia Lege XII. Tabularum Testamentariae Hereditates confirmantur.

To leave this Argument therefore: when the Romans had a Liberty granted them to dispose of their Effects by Will, the *Conveniency* of it was approved by *Many*, and the *Authority* of it was held sacred by *All*. The *Conveniency* which I was mentioning, brings to my mind a remarkable

¹ Pag. 339.
Ed. Bryan.

markable passage of *Plutarch* in the Life of *Cato* the Censor³, which has not been understood by any of the Translators that I have met with :

Μεταμεληθῆναι δ' αὐτὸς ἐν παντὶ τῷ βίῳ τρεῖς μεταμελείας. μίαν μὲν, ἐπὶ τῷ γυναικί πιστεῦσαι λόγον ἀπόρρητον· ἑτέραν δὲ, πλεύσας, ὅπε δυνατόν ἦν περὶ εἶναι· τὴν δὲ τρίτην, ὅτι μίαν ἡμέραν ΛΔΙΑΘΕΤΟΣ ἔμεινεν.

In English thus :

He never repented but of three things during the whole course of his Life. One of which was, that He had trusted his Wife with a Secret : The Second, that He had once gone by Water, when He might as well have gone by Land : The Third and last was, that He had passed over one day, without having a Will by him.

What a forry Sight, to find the following Translation subjoyned to this Text in an Edition set out by Scholars !

Tertium, quod unum diem per incuriam inanem effluere pateretur.

A Word or two of their Awfulness and Authority.

Habeat unusquisque licentiam sanctissimo Catholico venerabilique Concilio decedens bonorum quod optaverit relinquere, et non sint cassa iudicia ejus. Nihil enim est quod magis hominibus debeatur, quam ut supremæ Voluntatis, postquam jam aliud velle non possunt, liber sit stylus, et licitum, quod non redit, arbitrium².

³ C. 1. 2. 1.

My Reader will see more Reasons than One why I chose to add the following Law particularly :

Omnia quaecunque ex hodierna die Testator disposuerit de talibus, sive Vir, sive Mulier consistat, hæc valeant. Disponat itaque unusquisque super suis, ut dignum est ; et sit Lex ejus Voluntas. Sicut et antiquissima nobis Lex, et prima pene Reip. Romanorum disponens, ait (dicimus autem duodecim tabularum) secundum antiquam et patriam linguam ita dicens : Vti legasset quisque de sua re, ita jus esto, nullo valente citra illius voluntatem, nec si sacram impetret formam, nec si quispiam aliud omnium, aliquid aliter disponere in rebus alienis¹.

¹ Nov. 22. 2.
pt.

² II. Philip.
42.

³ Lib. VII.
Cap. VIII.
DE DATIS
TESTAMEN-
TIS.

The Regard which the Romans paid to the Sanction of a Will, and the Horror they had of defeating the last Law of private Men (for, as *Tully* writes², *In publicis nihil est Lege gravius ; in privatis firmissimum est Testamentum*) is very visible from a number of little Stories in a Chapter of *Valerius Maximus*³ and many other Passages of Antiquity. I have some Observations to make upon one Branch of this Regard, and that is, the PRESERVATION of them ; I mean both before their Publication, and after.

We see from *Diogenes Laertius*, that *Theophrastus* lodged several Copies of his Will with his Friends, all of them sealed with his own Seal, and
all

all of them attested by several Witnesses. The Romans added another way besides. It was the Custom of that People, as indeed it had been of some before them, to lodge Things of the greatest Value and Consequence in their Temples, where the Religion of the Place would regularly protect them from Violence: as their *Money* particularly, their *Records, Trusts, Deposites, Sequestrations*, their *Law, Leagues, Treaties, Standard Weights and Measures*⁴, but more especially their *Wills*. Of which take the following Instances.

⁴ Above, pag. 12. 4.

Julius lodged his with the Vestals:

*Postulante L. Pisone socero, testamentum ejus aperitur: recitaturque in Antonii domo, quod Idibus Septembribus proximis in Lavicano suo fecerat, demandaveratque Virgini Vestali Maximae*⁵.

⁵ Sueton. Jul. §. 83.

And so did his Successor after him:

*Testamentum L. Planco, C. Silio Coss. III. Nonas Aprilis, ante annum et quatuor menses quam decederet, factum ab eo, ac duobus Codicibus, partim ipsius, partim libertorum Polybii et Hilarionis, manu scriptum, depositumque apud se Virgines Vestales—protulerunt*⁶.

⁶ Id. Aug. §. 83.

Τὰς Διαθήκας αὐτῆ [Augusti] ὁ Δρῶσθ' ἐκ τῶν ἀειπαρθένων τῶν τῆς Εἰσίας ἱερεῶν, αἷς παρέβητο, εἰληφῶς εἰς τὸ συνέδριον εἰσήνεκε, καὶ τὰς σφραγίδας οἱ καλασημνημένοι ἐπεσκέψαντο, καὶ ἀνεγνώθησαν ἐν ἐπηκόῳ τῶ συνέδριῳ.*

⁷ Zonaras X. Annal. 38.

*Nihil primo Senatus die agi passus, nisi de supremis Augusti. Cujus Testamentum inlatum per Virgines Vestae Tiberium et Liviam heredes habuit*⁸.

⁸ Tacit. I. Annal. 8.

So of many more:

*In Testamento Ptolemaei patris heredes erant scripti ex duobus filiis major; et ex duabus ea quae aetate antecederat. Haec uti fierent, per omnes Deos, perque foedera, quae Romae fecisset, eodem testamento Ptolemaeus P. R. obtestabatur. Tabulae Testamenti unae per legatos ejus Romam erant adlatae, ut in aerario ponerentur (hae, quum propter publicas occupationes poni non potuissent, apud Pompeium sunt depositae) alterae, eodem exemplo relictæ atque obsignatae Alexandriae proferebantur*⁹.

⁹ Caesar. III. B. Civ. 108.

* Testamentum ejus Drusus a Virginibus Vestalibus quibus commissum erat, acceptum ad Senatum detulit: et ubi sigilla ab iis qui obsignaverant erant inspecta, recitatum est audiente Senatu.

And this was the Case of *M. Antony's Will*.

Αποδράντες ὡχούτο πρὸς Καίσαρα, καὶ περὶ τῶν Ἀντωνίᾳ διαθηκῶν ἐγίνοντο μηνυαί, τὰ γεγραμμένα συνειδότες. ἀπέκειντο δ' αὐταὶ παρὰ ταῖς Ἑστιάσι παρθένοις, ἃ Καίσαρ αἰτῆντο, καὶ ἔδοξαν· εἰ δὲ βέλοιο λαμβάνειν, ἐλθεῖν αὐτὸν ἐκέλευον¹.

¹ Plutarch. in
Anton. pag.
124. T. V.

The History is this. *Antony had deposited his Will with the Vestal Virgins. Upon a Rupture between him and Augustus, the latter had intelligence where it was lodged: and sends for it. The Depositories return answer, that it would be in them a breach of Trust to give it up: But if He would come in person, and demand it, They were not strong enough to oppose him. The Religiouses having thus quieted their Conscience, the Emperor got Possession of what he wanted; and marking the exceptionable passages, laid them before the Senate. This was thought a scandalous measure in Augustus, to arraign as it were a Man, πρὸς ὧν ἐβλήθη γενέσθαι μετὰ τῷ τελευτῷ, says my Author, for what He was desirous should be done after his Decease.*

Donationis praediorum epistolam, ignorante filio, Mater in Aede sacra verbis fidei commissi non subnixam deposuit, et literas tales ad aedituum misit: Instrumentum Voluntatis meae post mortem meam filio meo tradi volo².

² D. Lib.
XXXI. Lex.
LXXVII. §.
26.

Sed et tabulas Testamenti debet aut apud eum, qui ex maiore parte heres est, jubere manere, aut in Aede deponi. Nam et Labeo scribit, vendita hereditate tabulas testamenti descriptas deponi oportere; heredem enim exemplum debere dare, tabulas vero authenticas ipsum retinere, aut in Aede deponere³.

³ D. 10. 2. 4. 3.

Proinde et si custodiam Tabularum Aedituus vel Tabularius suscepit, dicendum est teneri eum Interdicto⁴.

⁴ D. 43. 5. 3. 3.

De Tabulis proferendis Interdictum competere non oportet, si hereditatis controversia ex his pendet, aut si ad publicam quaestionem pertinet. Itaque in Aede sacra interim deponendae sunt, aut apud virum idoneum⁵.

⁵ l. 5. eod.

But there was something like this at Athens:

Κατὰ τὰδε δίδωμι τὰ ἐμαυτοῦ πάντα Ἀμυνομάχῳ Φιλοκράτῃ Βαλῆθεν, καὶ Τιμοκράτῃ Δημητρίῳ Ποταμίῳ, ΚΑΤΑ ΤΗΝ ΕΝ Τῷ ΜΗΤΡΩΛΩ, ΑΝΑΓΕΓΡΑΜΜΕΝΗΝ ΕΚΑΤΕΡΩ, ΔΟΣΙΝ⁶.*

⁶ Diogen.
Laert in E-
picuro.

* Juxta haec lego omnia mea Amynomachō Philocratis ex tribu Batenfi et Timocrati Demetrii ex tribu Potamensi, juxta formam Donationis in aede Martis Deum conscriptae.

I might

I might add, and the occasion tempts me, some Observations to the foregoing, which may not relate immediately to the Custody and Preservation of Wills in places of Security, but, what is of no little Consideration, and of some Connection, to their due Execution. Nothing is so certain in the Roman Establishment, as the right, which the PONTIFICAL College had in many points of Jurisdiction, and to this Inquiry I have assigned one whole Chapter of this Treatise⁷. Of these several are, what with us would be called of an Ecclesiastical nature, as that Section abundantly shews. It was not the most inconsiderable of these Powers, that they had a right of enforcing the Execution of such Wills, as contained any Legacys or Bequests *ad pias Causas*, or to Purposes of a religious Concern.

⁷ Above pag. 72. seqq.

Si defuncto monumentum, conditionis implendae gratia, bonae fidei possessor fecerit, potest dici, quia voluntas defuncti in hoc servanda est, utique si probabilem modum faciendi monumenti sumptus, vel quantum testator jusserit, non excedat, eum, cui auferitur hereditas impensas doli exceptione aut retenturum, aut actione negotiorum gestorum repetiturum, veluti hereditario negotio gesto. Quamvis enim stricto jure, nulla teneantur actione heredes ad monumentum faciendum, tamen Principali vel Pontificali auctoritate compelluntur ad obsequium supremae voluntatis⁸.

⁸ D. 5. 3. 50. 1.

I will not say, that, when the Emperors became Christian, They gave this Power to their Bishops, upon the same principles, that the ancient Romans gave it their *Pontifices* (and yet it looks somewhat like it⁹), nor will I affirm, that this was the Original of our Ecclesiastical Jurisdiction in Probates and Administrations. I refer my Reader for farther satisfaction upon this last Head, to what has been written professedly upon that Subject by *Spelman* and *Selden*. To which He may add the Sentiments of the two great Writers upon the *Provincial*¹ and *Legatine*² Constitutions: or perhaps may see them all comprized in *Swinburn*³.

¹ De Testam. c. Item quia. verb. Inimutationem.

² Constit. tit. Orthobon. tit.

³ De Execut. Testament.

⁴ Part VI. §. XI.

Having cleared my way thus far, and examined into some general principles concerning these Successions, I shall add a word or two upon the distinct and separate Rules of each of them; the *Successio ex Testamento*, and the *Successio ab Intestato*.

I.

TESTAMENTVM (or LAST WILL) is thus defined by *Modestinus*⁴. ⁴ D. 28. 1. 1.

Voluntatis nostrae juxta Sententia de eo quod quis post mortem suam fieri velit.

One great and principal use of a good Definition is this, that it may be considered as a whole Doctrine in Epitome: And thus, I am persuaded, all the necessary Knowledge upon the Subject of *Testamenti-factio* would turn up, by carefully surveying the Terms contained in the Definition before us.

The Genus is SENTENTIA. By this We are to understand, that a last Will and Testament is not, and cannot be, understood of every abortive Wish, or imperfect Thought: but that it is a serious and deliberate Act, partaking somewhat of that Judicial Proceeding, from whence the Metaphor is borrowed: A Decree or Determination, built upon Reason, Judgement, and Examination; which is to operate as Law with those who are concerned, and act under it, almost in the same manner, as *Res Judicata*, or Reports, are a Rule of Law with a State or People under that Jurisdiction.

* IV. de Benefic. 11.

There is a Passage in *Seneca**, which shews the Importance and Solemnity of this Proceedure, and supports my Observation.

Quid cum ipso vitae in fine constitimus, cum Testamentum ordinamus, non beneficia nobis nihil profutura dividimus? Quantum temporis consumitur, quam diu secreto agitur, quantum et quibus demus? Quid enim interest, quibus demus, a nullo recepturi? Atqui nunquam diligentius damus, nunquam magis judicia nostra torquemus, quam ubi remotis utilitatibus, solum ante oculos honestum sletit: tamdiu officiorum mali iudices, quamdiu illa depravat spes ac metus, ac inertissimum vitium voluptas. Vbi Mors interclusit omnia, et ad ferendam sententiam incorruptum iudicem misit, quaerimus dignissimos, quibus nostra tradamus: nec quidquam cura sanctiore componimus, quum quod ad nos non pertinet.

That I may carry on my Allusion, let it be observed moreover that this Sentence is not *definitive*, till the Death of the Testator. For till that time it is revocable at the pleasure and discretion of the Party himself (as the Terms *Sententia Voluntatis* import), and by some has been therefore compared to the Interlocutory Sentence of a Judge, which is ambulatory, and may be corrected any time before the Conclusion of the general Process.

If Reason and Judgement have so great a Share in this Act, it will follow of necessity, That Children, Ideots, Lunatics, *etc.* are justly excluded by general Consent: That the Profession of this Power of Judgment frequently makes a solemn part of the Contents at setting off, as We have seen very lately: That the Want of it is a very frequent Plea in Courts of Judicature, to invalidate the Force and Efficacy of such Designations: And lastly, That it is very agreeable to Reason and good Policy, when We find every Community and well regulated State agreeing to fix some one Period of Life, which shall determine what is meant by Minority, or Incapacity of Judgment. As in this Kingdom no Devise of Lands is good till One and Twenty.

It is said to be VOLUNTATIS NOSTRAE. And here it is to be understood, that all Fraud and Violence, all *Vis et Dolus* (both so opposite to this Essential Requisite, the Freedom of Choice, as We have seen more largely in the Article of MARRIAGE) stand excluded, by the very Idea which We are taught to conceive of this Act, and by the Emphasis of that Term

Term [WILL] which in our Language stands to denote the whole Process and Operation.

It is hence, that in the Roman Law no *Filiusfam.* of what Age soever, was capable of making a Will, *ne quidem permittente Patre.* For He, who was in *Manu et Potestate alterius*, was supposed to have no Will of his own: And that Son in this respect did not differ from the Slave.

It is upon this Footing also, that with that People a Will made in Captivity was not valid: for the Testator was not *sui Juris.* The Will of such Captive moreover was not good, if He should afterwards regain his Liberty*. But a Will made before, and the Testator dying in his Captivity, ⁴D. 28. .8 pr. shall be good, because by the Fiction of the *Cornelian* Law, the Heir was in before the Decease of the Testator. This Disability does not attend ¹D. 28. 6. 28. the Captivity by Pirates, *etc.* because that was not a just Captivity, nor did it affect their Liberty, as We have seen upon a former Occasion⁶. ⁶ Above, pag.

This Consideration moreover involved all such as might have a Will of ⁴16. their own, but could not express it; and, what was very reasonable, reached to those Wills, which depended on the Wills of other People, *Testamenta in alienam voluntatem collata*, because it is express in the Definition, *Sententia Voluntatis NOSTRAE.*

Illa Institutio, QUOS TITIVS VOLVERIT, ideo viciosa est, quod alieno arbitrio permissa est. Nam satis constanter Veteres decreverunt, Testamentorum Jura ipsa per se firma esse oportere, non ex alieno arbitrio pendere⁷.

⁷ D. 28. 5. 32.

It is hence, that the Will or Meaning of the Testator has been called ^{pr.} by some the Sovereign of the Testament, and in all dubious Cases, has been ever looked upon as the Guide and Rule of interpretation.

The Necessity of this Freedom and Integrity of the Will was the Care and Circumspection of *Solon* also.

Σκέψασθε δὲ, καὶ διότι, ὅδ' ἂν ἄπαις τις ἦ, κύριός ἐστι τὰ αὐτῷ διαθεῖναι, εἰ μὴ εὖ φρονῇ νοσῶντα δὲ, ἢ φαρμακῶν, ἢ γυναικὶ πειθόμενον, ἢ ὑπὸ γῆρας, ἢ ὑπὸ μανίῶν, ἢ ὑπὸ ἀνάγκης τινὸς κατὰ ληφθέντα, ἄκυρον κελεύουσιν εἶναι οἱ νόμοι⁸. *

⁸ Demosth. c. Steph. 6. n. Ed. Paris. 22.

Οὐ μὴν ἀνέδην γε πάλιν, ὅδ' ἀπλῶς τὰς δόσεις [testamentarias] ἐφῆκεν, ἀλλ' εἰ μὴ νόσων ἕνεκεν, ἢ φαρμάκων, ἢ δεσμῶν, ἢ ἀνάγκῃ κατασχεθεὶς, ἢ γυναικὶ πειθόμενος. Εὖ πάντῃ καὶ προσηκόντως τὸ ΠΕΙΣΘΗΝΑΙ παρὰ τὸ βέλτιστον ὅδ' ἐν ἡγούμενος τῷ ΒΙΑΣΘΗΝΑΙ διαφέρειν, ἀλλ' εἰς ταυτὸ ΤΗΝ ΑΠΑΘΗΝ ΤΗΙ ΑΝΑΓΚΗΙ, καὶ τῷ πόνῳ τὴν ἡδονὴν θέμενος, ὥς ἔχ' ἡττον ἐκστῆσαι λογισμὸν ἀνθρώπων δυναμένων⁹. †

⁹ Plutarch. in Solone, pag. 197. Edit. Bryan.

* Considerate porro, quare, nec, si quis orbis est, condendi testamenti potestatem habeat. Si inquit, deliret, aut aegrotet, aut venenum biberit, aut uxori obsecutus, aut senio, aut furore, aut aliqua necessitate sit circumventus, et potestatem leges negant.

† Nec indefinite tamen citra delectum dare indulget, sed si non per morbum, vel medicamentum, nec vinculis, vel vi adstrictus, vel uxoris inductus esset blanditiis. Recte atque ordine, improbis modis inducaris an vim patiaris nihil ratus interesse, sed dolum vi et voluptatem dolori conficiens, quasi aequae de statu mentis dejicere homines valeant.

The

The *Ανάγκη* mentioned by *Plutarch*, and *Demosthenes*, is agreeable to Spirit of the Roman Law. *ὑπ' ἀνάγκης, ἢ ὑπὸ ΔΕΣΜΟΥ κατὰ ληφθεὶς*,* says ¹ *Ibid.* n. 25. *Demosthenes* in another place¹. And let me not forget to add, that what the Athenian Law has in regard to Sicknefs and Old Age, seems to demand a gentle Constrution, and to imply that such Sicknefs or such Old Age has damaged the Understanding. For bodily ill Health cannot reasonably of itself defeat the Execution of the Testator's Pleasure: as *Labeo* well observes²:

In eo, qui testatur, ejus temporis, quo testamentum facit, Integritas Mentis, non Corporis Sanitas exigenda est.

It is pleasant to observe, that wherever this Constitution of *Solon* is recorded, the Sollicitations of the Wife are not forgot among the invliding Circumstances. But there are other Characters, and other Sollicitors, which *Solon* would have guarded against—if He had known them.

It follows in the Definition, that it shall be *IUSTA Voluntatis Sententia*. Which doubtless means a Will drawn up, attested, declared, and executed with all the Solemnities and Observations, with all the Rules and Formalities, that were expected by Law. For that is the true and adaequate Notion of *Justum*, sc. *id quod Jure fit, vel, secundum Juris Requisita*³

³ Above, p. g. 269. For to the Validity of a Will, it is not only necessary, that the Testator should be a person capable of making it, which is called by Civilians *Testamenti-Factio Activa*, but moreover, that all the Forms of Law should be duly and faithfully complied with:

*Si quaeramus, an valeat Testamentum, in primis animadvertere debemus, an is, qui fecerit testamentum, habuerit testamenti factionem: deinde, si habuerit, requirimus, an secundum regulas Juris Civilis testatus sit*⁴.

⁴ D. 28. 1. 4.

⁵ Above, pag. 134.

And because by Law, or *Jus*, the Romans always meant their own, therefore the Wills of Aliens, and all People other than Roman Citizens, were excluded the Consideration of this Definition. And This extended so far, that Testator, Witnesses, and Heir, were all required to be Romans. There is something like it in the Appointment of *Solon*, though it does not appear, that He was quite so rigorous, as the last-mentioned Circumstance shews us the Romans were. It is pity we have no more Intelligences left us of the Athenian Dispensation in this great Article, than what We can glean from the few Writers, who have mentioned it incidentally. But even that little has not been so much attended to, as it deserved.

One great Solemnity required to the Execution of a *Just* Will, with the Romans, was the Attestation of it. And indeed the Number of Subscribing Witnesses, their Condition and other Circumstances, were in this Constitution extremely burthensome. The Wisdom of our Establishment has

* *Sub aliqua necessitate constitutus, vel in vinculis detentus.*

very discreetly reduced the Number to Two for the Devises of Personal Estates, and Three for those of Land.

The Appointment of an *Heres*, or Executor, was also essential: a Form so necessary, that Practice at least if not Law, required That as the principal Ingredient. This was the Spirit that was to give Life and Motion to the whole, and therefore generally stood at the Beginning:

*Qui testatur, ab heredis institutione plerunque debet initium facere testamenti: licet etiam ab exheredatione, quam nominatim facit. Nam D. Trajanus rescripsit, posse nominatim etiam ante heredis institutionem filium exheredare*⁶.

⁶D. 28. 5. 1. pr.

The Definition ends with *POST MORTEM fieri velit*. Many useful Observations may be drawn from this Particular, if it was extended to those several Considerations of which it is capable. It is to be noted however, that when a Will is called *Suprema Voluntas, Vltimum Judicium*, etc. it is not to be understood so much in regard to the *last* Will among several, as the Case often happens, and where the last has a Preference, and indeed a just Title to it.

*Non autem omnes tabulas Praetor sequitur hac parte Edicti, sed supremas, hoc est, eas, quae novissimae ita factae sunt, post quas nullae factae sunt. Supremae enim hae sunt, non quae sub ipso mortis tempore factae sunt, sed post quas nullae factae sunt, licet hae veteres sint*⁷.

⁷D. 47. 11. 1.

But moreover, because it begins to operate, as it were, *in ipso articulo mortis*, and has no efficacy whatever before that Time. Now this Consideration which supposes it to be the Sentiments of a dying Man, has a farther Use; and that is This: It is imagined to take Place at that particular Period (at what time soever it was made and executed), because the Law ran, That if a Man had a Right to make a Will, and accordingly did so, but afterwards forfeited that Right by a capital conviction, his former Will should not take place.

*Exigit Praetor, ut is, cujus bonorum possessio datur, utroque tempore jus testamenti faciendi habuerit, et cum facit testamentum, et cum moritur*⁸.

⁸D. 37. 11. 1.

*Si cui aqua et igni interdictum sit, ejus nec illud testamentum valet, quod ante fecit, nec quod postea fecerit*⁹.

⁹D. 28. 1. 8. 1.

*In Insulam deportati in eadem causa sunt*¹.

¹§. 2. eod.

These Observations are rather a Specimen of what may be struck out of this Definition of *Modestinus*, than intended to present my Reader with an accurate View of this great Branch of Roman Legislation, so extensive in its Nature and Circumstances. However the great Lines of this Article are here sketched out in some degree, and enough may have been said, for an Author of Elements only. My Reader (if the *Five Hundred and Thirty Fifth* Page of an unpopular Treatise has found a Reader) may possibly imagine,

gine, that I had shewn a greater Concern for my Bookseller, if I had been more Elementary than I am.

But it is a great Advancement in the Knowledge of the Civil Law, to be acquainted even with first Principles only. For next, as to LEGACIES: by seeing that the *Heres Testamenti* is the full Representative of the Testator, stands in his Place, and succeeds in his Rights (as indeed He does of his Incumbrances also), We easily acknowledge the Propriety of the Expression, when a *Legacy* in a Will was called by the Roman Lawyers, *Delibatio Hereditatis*. It is defined with great Caution by the Emperor².

Donatio quaedam a Defuncto relicta, ab Herede praestanda.

The usual Terms of Legacies were DO LEGO. Now this, as it implied a Favour or Emolument, was somewhat different from the Circumstance, under which the *Heres Testamenti* appeared, who might sometimes succeed into a *burthensome*, and not necessarily and altogether, a *lucrative*, Function.

As it was directed to the Legatee, *Titio Da Lego*, and not to the Executor, it differed from a Trust, or *Fidei-Commisum*, which was something incumbent upon the Executor to perform, some *Commission* which He was bound to *execute*; whereas This was entirely an *Emolument* which the Other was intitled to *receive*.

Though this was stiled *Donatio*, it was however, as We see, *quaedam Donatio*. It was not altogether, purely, and simply a Gift or Donation in all Senses of the Word. For Donations were necessarily during the Life of the Donor, and this could not possibly take place till his Death. Indeed there was a Donation, which much resembled a Legacy, and which, to use the Words of the Emperor³, *Ad exemplum legatorum redactum est — per omnia fere legatis connumeratum*. It was *Donatio Mortis causa*: and it is thus defined,

*Cum magis se quis velit habere, quam eum cui donat, magisque eum, cui donat, quam heredem suum*⁴,

This is called a Donation in Prospect, or in Contemplation, of Death, by English Writers. It is not amiss to observe its Antiquity.

Πείραι' ε' γάρ τ' ἴδμεν ὅπως ἔσαι τάδε ἔργα.
Εἶκεν ἐμὲ μνηστῆρες ἀγῆνορες ἐν μεγάροισι
Λάβρη κλείναντες, παρῳία πάντα δάσονται,
Αὐτὸν ἔχοντά σε βέλομ' ἐπαυρέμεν, ἢ τινα τῶνδε.
Εἰ δέ κ' ἐγὼ τέτοισι φόνον ἔκῃρα φυτεύσω,
Δὴ τότε μοι χαίροντι φέρειν πρὸς δῶμαλα χαίρων⁵.*

² Homer. Odyss. P. 78.

* We know not yet the full Event of all;
Stabb'd in his Palace, if your Prince must fall,
Us and our House if Treason must o'erthrow,
Better a Friend possess them, than a Foe.
If Death to these and Vengeance Heav'n decrees,
Riches are welcome then, not else, to me:
Till then, retain the Gifts.

POPE.
To

To this Passage of *Homer* let me add one of *Xenophon*,

¹ Anab. I. V.
pag. 375. Ed.
Hutchinsf.

Καλέλιπε παρὰ Μεγαβύζῳ τῷ τῆς Ἀρτέμιδος νεωκόρῳ, ὅτι αὐτὸς κινδυνεύ-
σων ἐδόκει ἵεναι μετὰ Ἀθησιλάῳ ἐν Κορωνείᾳ· ἃ ἐπέσειλεν, ἣν μὲν αὐτὸς
σωθῆ, ἑαυτῷ ἀποδέναι· εἰ δέ τι πάθοι, ἀναθεῖναι.*

The same Story is recorded by *Laertius*.

² II. 51.

Γενόμενος ἐν Εφέσῳ, ἃ χρυσίον ἔχων, τὸ μὲν ἡμισυ Μεγαβύζῳ δίδωσι τῷ
τῆς Ἀρτέμιδος ἱερεῖ φυλάττειν ἕως ἂν ἐπανέλθῃ, εἰ δέ μὴ, ἄγαλμα ποιη-
σάμενον, ἀναθεῖναι τῇ θεῷ.†

There is an Instance of this also in the *Alceſtis* of *Euripides*.

³ V. 1020.

Γυναῖκα τήνδε μοι σῶσαι λαβὼν,
Ἔως ἂν ἴπῳκας δεῦρο Θρηκίης ἄγων
Ἐλθῶ, τύραννον Βισόνων κατακτανών·
Πράξας δ' ὃ μὴ τύχοιμι (νοσήσαιμι γὰρ)
Δίδωμι τήνδε σοῖσι πρόσπολον δόμοις.‡

II.

THE SUCCESSION INTO THE ESTATES OF INTESTATES is one of the most uncertain points of Law. I call it uncertain, First, because there are not found perhaps two Nations upon Earth, that have fixed upon the same Method of Conveyance: and, Secondly, because there is scarce one, but what has at some time or other differed even from itself. With the Romans particularly, the Distribution, which prevailed for some time, took a different turn, even while the Emperor was compiling his Body of Law, and the System of the *Novels* (the CXVIIIth particularly) entirely defeats the doctrine laid down in several Titles of the third Book of the *Institutes*, where that Matter was considered, and meant to be established. With the *Novels* it settled.

To contemplate therefore this Question, the Stream of Nature conducts us first to view Succession in the Order of

DESCENDANTS.

* Reliquit cum Megabyzo aeditus Dianae, ubi ipse una cum Agesilao periculum subiturus in Coronea proficisci videbatur: et mandabat, si saluus rediret, ut sibi restitueret; aliter, Deae consecraret.

† Profectus Ephesum, dimidium auri quod secum tulerat, Megabyzo, Dianae sacerdoti, servandum tradit, quoad reverteretur: sin secus, statuat ex eo confectam Deae consecrare jubet.

‡ Mulierem hanc mihi serves acceptam
Donec adducens Thracios equos huc
Rediero, interfecto tyranno Bistonum.
Si vero male rem gessere, quod absit! (redeam enim!)
Do hanc ancillam tuae familiae.

This was the Natural Course, and the general Direction of Providence. And be it observed, that Natural Law is said by Some to be interested no farther, than in the Succession of those, who claim from under us: and that Ascendants and Collaterals are called in by Civil Law. Which yet by others is denied, and, I think, with sufficient reason. However the primary Distribution of Nature is very apparent.

Cum Ratio Naturalis, quasi Lex quaedam tacita, liberis parentum hereditatem addiceret velut ad debitam successionem eos vocando, propter quod et in Jure Civili suorum heredum nomen eis inductum est, ac ne judicio parentis, nisi meritis de causis summoverti ab ea successione possunt —

³ D. 48. 20. 7.

The great Rule of Succession among the Romans, in the Method which lyes before us, viz. the Succession of Descendants, is comprized in these few Reflexions; *That* (1) Descendants, while they last, exclude all other Relations whatsoever: *That* (2) there is no Respect had to Primogeniture, and (3) no Preference in regard to Sex: *That* there is (4) no Exclusion of any ever so remote Degree: and lastly (5) *That* the Estate of the Intestate makes so many general Shares, as there are distinct Heads in his immediate Descendants.

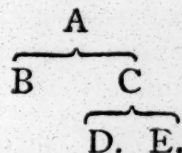
I. For, as this downward Direction was the primary and principal Recommendation of Natural Law, it followed, that Inheritances could never revert, or be thrown *upwards* (*inter Ascendentes*), nor be turned *aside* (*inter Collaterales*), as long as any were to be found in the Line *below*, or that of Descendants, *in infinitum*. For the Principle, upon which this Succession rested, was the *Jus Repraesentationis*, which can not be fairly or reasonably imagined in any other Line than in that, to which We give Existence. There is something of *Successive* in the Idea of Representation, something which looks like keeping up an Order or a Series; and though to Brothers it may be applied in some Sense, to Fathers and Grandfathers it can be applied in little or none.

II. III. The Second and Third Particulars, viz. the Disregard of Sex and Primogeniture, in which these People differed from most others, as well before, as after them, are of that arbitrary Consideration, that little remains to be observed upon that Disposition. But Natural Equity has a great Stroke in the two Last, and calls for some Regard:

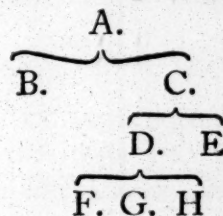
IV. V. That Descendants of the Second, Third or Fourth Degree, should be raised to a kind of Level with those of the First, and not stand excluded, even while some of the First remain: That Children of a Remote Descent should inherit *along* with the immediate One (I suppose the Way cleared before them) is agreeable to Truth and Justice. The Grandchildren, *etc.* of *Sempronius* by a Son that is gone, stand to *Sempronius* in the place of that Son.

Son. They would have had their Shares *through* that Father, if He had lived; and represent him therefore, or succeed to his Rights, now He is removed.

And hence, because *many* Children may succeed into *one* Father's Rights, it follows, that the *Jus Repraesentationis*, which transmits the Estate of *Sempronius* to his immediate Descendants, shall undergoe a considerable Alteration in those Descents or Generations that follow after. Though *Sempronius* may be represented by any Number of Children indifferently, and cut into so many Shares accordingly, yet will each of those Children be represented by their whole Families; not by so many distinct *Heads* of Children, as *Sempronius* was, but by all their Children collectively (let their Number be what it will) laying, as it were, their Heads together to form one common *Stock*. For all those Grandchildren *gregatim*, have that Right in common, not separate to *Each*, which their Father had to *Himself*. And this is called *Successio in Stirpes*: the Other, when All share alike, in *Capita*. Thus in the Scheme,



The Estate of *Sempronius* A will be divided into two equal Parts, and B and C will each be Heirs *ex Semisse*. But supposing that C is gone before his Father, then shall B still be *Heres ex Semisse*, and D and E *ex Quadrante*, each. Or put the Case



that C and D should both be gone, and D be represented by F. G and H. then will B as before be *Heres ex Semisse*, E *ex Quadrante*, and F. G and H will succeed each of them *ex Vncia*. Or put the case, that E is Dead without Issue also, then will F. G and H be each of them *Heres ex Sextante*.

But, taking leave of Descendants, supposing that *Sempronius* dyes Intestate, without Heirs of his Body, We are then directed to the Consideration of

ASCENDANTS.

Though this may be against natural Order, it is not against natural Affection. And I think therefore that Doctrine is not to be admitted,

Y y y 2

which

which maintains, that Parents had no Right to the Goods of their Children, dying Childless and Intestate, unless they had been relieved by the Civil Law. We have seen⁹ what Title the indigent Father has to a Maintenance, and the same Way of reasoning will serve in the one case as well as the other¹.

⁹ Above, pag. 367. seqq.
¹ See Gothofred. ad Novell. 1. Praef. §. 2.
² 2 Cor. XII. 14.

And when St. Paul said², *The Children ought not to lay up for the Parents, but the Parents for the Children*, it is spoken with a view to the ordinary course of Providence. It is the Rule, without regard to the Exception.

But I observed, that this is up the Stream, and against the common order of Succession. And the Ancients always gave it that melancholy Consideration. We find it a constant matter of Complaint in their funeral Sorrows, when such Calamities befel them. TVRBATO ORDINE MORTALITATIS — PARENTES FILIO CONTRA ORDINEM — ET QVOD MISERIMVM EST MATER FECIT FILIAE — ORDINE RETROGRADO DEFUNCTO — PARENTES MALE IVDICANTIBVS FATIS SVPERSTITES — MEMORIAM POSVERVNT CONTRA VOTVM — QVOD FILIVS PATRI FACERE DEBVERAT IPSE FECIT — AEQVIVS ENIM FVERAT VOS HOC MIHI FECISSE — QVAE PRIOR DEBVI MORI⁶ — are the common Expressions upon this Occasion.

³ Gruter, DCLXXXVI. 9.

To give these Considerations some little Attention.

⁴ Ovid. I. Heroid. 101.

This is the Language of the Poet⁴,

*Dí precor hoc jubeant, ut, euntibus ordine fatis,
Ille meos oculos comprimat, ille tuos.*

⁵ D. 5. 2. 15. pr.

And of the Lawyer also⁵:

Nam etsi parentibus non debetur filiorum hereditas, propter votum parentium, et naturalem erga filios caritatem, turbato tamen ordine mortalitatis, non minus parentibus, quam liberis pie relinqui debet.

Thus the Inscriptions:

ANTONIUS SEVERVS AQVILA HIC IACET
SINE ANIMA MISERABILI FATO QVI VIXIT
ANNOS BISSENNOS ET SEX MENSES CVI VOTA
ERANT VT PARENTIBVS ISTA PARARET
SET MORS IMMATVRA FECIT VT FACERENT
PARENTES FILIO CONTRA ORDINEM⁹.

⁶ Gruter, DCLXIX. 4.

Another remarkable Expression is *contra votum*, as We have just seen from *Papinian*⁷. And so the Inscriptions run,

⁷ D. 5. 2. 15. pr. Acc. 29. 4. 26. 1.
38. 6. 7. 1.
38. 2. 50. 2.

MOTA-

PROPERTY.

542

MOTARIAE P. F. PISS.
MASCELLIO F. FELIX ET
TVTATIA CRISPINA
FILIO DVLCISSIMO
MEMORIAM POSVERVNT
CONTRA VOTVM²

Thus we read in *Plutarch*³:

Η ΤΕΤΕ ΜΗΤΗΡ ΚΑΤΑΡΑΝ, ΕΚ ΕΥΧΗΝ ἡγεῖται τὸ, ΤΕΤΟΝ ὑπὲρ γῆς ἀπο-
ΛΙΠΕῖΝ*.

² Gruter.
DCXCVI.
10.
³ in Vita Ca-
tonis Maj.

And it is not to be doubted, but that, from this Strain of Affection, and this Parental SUPERSTITION, that very word has gained its Signification:

*Qui totos dies precabantur, et immolabant, ut sui sibi liberi superstites essent, Superstitiosi sunt appellati, quod nomen postea latius patuit.*¹ Cic. II. de N. D. 28.

L. SPERATI DESIDERATI ADVLESCEN
TIS SPEI ET PIETATIS INCOMPARABI
LIS SPERATI HERMODORVS ET IVLIA
NA PATRES MALE IVDICANTIBVS
FATIS SVPERSTITES POSVERVNT².

² Gruter.
DCCVII. 5.

*Non est ignotum, qualem Te Personam patris Tui gesseris: quem non minus quam liberos dilexisti: excepto eo, quod non optabas super-
fitem.*³

³ Senec. de
Consolat. ad
Marcum. init.

Plautus begins his *Afinaria* with a memorable Passage:

*Sicut tuum vis unicum gnatum tuae
Supereffe vitae, sospitem et superfitem!
Ita te obtestor, per senectutem tuam,
Perque illam quam tu metuis, uxorem tuam,
Siquid me erga tu hodie falsum dixeris,
Vt tibi superstes uxor aetatem fiet,
Atque illa viva vivus ut pestem oppetas.*

The *Superstition* in this Passage, between the Case of the Son, and of the Wife, is considerably different.

And lastly, this leads me to recommend a new word to the Lexicons, (I do not recommend the Age of it):

M. L. FLORVS M. FL. F. M. L. FL. PRONEPOS INFELI
CISS. PARENS AFFLICTVS PRAEPOSTERITATE

* *Hujus Mater, execrationem, non votum, duxit, ipsum superfitem relinquere.*

P R O P E R T Y.

NAT. HV. FILIVM VN. H. COND. QVEM IMPORTVNA
MORS ADEMIT PRAEREPSITQVE SENII BACVLVM
CVIIAM DEFESSA AETAS ADNITENS PERBREVES
ANNOSSS. ALLEVABAT. HVNC AN I E MORS ADSEQVITVR
QVAM TRISTES LACHRIMAE DESERVERINT.

NOTA POST⁷

⁷ Gruter.
DCLXXXIV
6.

Praeposteritas is a very uncommon Expression, and I believe a barbarous one. But the Idea it represents, is very suitable to our Subject.

It is upon all these Accounts, that the Succession of the Parent into the Estate of the Child is always attended with these unfavourable Expressions, *Luctuosa Hereditas*⁸, *Luctuosa Portio*⁹, *Triste Lucrum*¹, *Durae Fortunae solatium*², *Tristis Successio*³. And it was imagined by Lawyers to pass in *Orbitatis solatium*. There is a Law often quoted upon this Occasion :

*Non sic Parentibus Liberorum, ut Liberis Parentium debetur Hereditas : Parentes ad bona liberorum Ratio miserationis admittit, liberos naturae simul et parentium commune votum*⁴.

⁴ D. 38. 6. 7. 1.

To settle therefore the Rules of Successions in *Linea Ascendente*, there are two Cases to be supposed possible,

I. Either there are no Collaterals besides, II. Or there are.

I. If there are no Collaterals, then the Succession of the Intestate's Estate, dying, as we suppose, childless, reverts in that melancholy Order, We have been just observing, and falls to his Father and Mother, or to either of them surviving, to the Exclusion of every Body above.

For it must be observed, that here is no *Jus Repraesentationis*; which I observed followed the Order of Nature and of Blood, and is constantly imagined downwards. Therefore, contrary to what was found to be the Rule in Descendants, here every nearer Degree excludes the remoter, and even the Mother shall exclude the Grandfather.

II. But if We suppose Collaterals to be left along with Ascendants, the Succession shall be divided. And put the case, that there is left a Father and Mother, a Brother and Sister, all the Four shall succeed in equal Portions. However. some Caution is necessary to be observed, and these Rules are not to be forgotten :

(1). Collaterals never can exclude Ascendants, even in the remotest Degree. For the Preference is with the Ascendants; and Collaterals can only share, not exclude.

(2). The Collaterals that share with Ascendants must be Brothers, or Brothers Children at farthest. No one can be admitted to a Dividend beyond

yond that Degree. For, as before, the Preference is properly with the Ascendants; Brothers were not called in till late in Law, viz. by the cxviiith Novel, and Brothers Children still later, viz. by the cxxviith.

(3). The Succession of Ascendants alone, of Ascendants joined with Brothers and Sisters of the whole Blood (for the Half Blood is excluded) is, as was observed, in *Capita*: but the Succession of Brothers and Sisters Children, in Concurrence, is in *Stirpes*, because they represent their *Parent*, and *Many* may represent *One*.

The last Consideration regards

COLLATERALS.

And here We suppose, that no One is left either in the Ascending or Descending Line whatever. I can imagine

1. Brothers and Sisters alone.
2. Brothers and Sisters together with Brothers and Sisters Children.
3. Brothers and Sisters Children alone.

1. Brothers and Sisters alone, of the whole Blood, succeed in *Capita*, to the Exclusion of the Half Blood.

2. Brothers and Sisters Children, concurring with Brothers and Sisters, succeed in *Stirpes*.

3. Nephews alone succeed in *Capita*, non in *Stirpes*: for they succeed (now) in their own Right, and not by Representation.

The Half-Blood succeeds for want of the Whole Blood, regularly and uniformly, in the manner of the whole Blood. And because the Half-Blood is called into the Succession in failure of the Whole, it will follow, that a Nephew of the Half-Blood should exclude an Uncle of the Whole. Because the Uncle's Right only commences, when Representation ceases.

In a Concurrence of Half-Blood, viz. when Brothers, etc. by the Father's Side succeed along with Brothers by the Mother's Side, the Rule of Law is, that They succeed separately into the Goods of the separate Sides: and into the common Goods in Common.

If none of these are given, then the next Relation indifferently, succeeds in order of Proximity. For the *Jus Repraesentationis* is specific, not general; it is extended to Brothers Children, but goes no farther. Thus the Uncle of the Intestate would be excluded by the Nephew, because the Nephew by this Right of Representation is, as it were, in the Entail: But the Uncle of the Intestate would not be excluded by a Son of that Nephew. For the Right of Representation being now stopt, the Uncle is nearer in Degree, than the Brother's Grandson.

If there be two next Kindred of equal Degree, They are equally intitled to the Succession, whether on the Father's side, or on the Mother's, and succeed in *Capita*.

These

P R O P E R T Y.

These are the general Principles of *Justinian's* last Regulation upon this Head. But in many of these Distributions which stand so far removed from natural Right: where the Stream of Blood must run but cool, and languid; where it is impossible to ballance the Affection towards one Relation, with the Affection towards another, by Principles of Nature; there Human Invention has insinuated its Assistance, and that is one great Reason of what I observed above, *viz.* that no two Nations can ever be found that agree in these delicate Circumstances.

In the modern Law again, a great deal depends upon the Distinction into Real and Personal Estates, which the Roman Law knew nothing of. This was agreeable to the Genius of our Ancestors, who distributed their Lands in Fee, and expected some Emolument in Return. As the Saxons therefore were perpetually loading Descents with Services, and of consequence were led to direct those Descents where those Services were likely to be maintained with the greatest Vigor and Advantage; This, I say, is the fairest Reason, and looks likely to be the true one, why the Father cannot succeed (in this Kingdom) into the Landed Estate of his Son. Because He cannot be supposed in a Condition to perform the Service that is expected from it. It was one Reason given in the Feudal Law, for the Exclusion of Daughters, *Quia Filiae servitia praestare non possunt.*

I have here exhibited what I professed, *viz.* an Account how this Distribution stood by Civil Law: I am sensible it deserves a fuller consideration, and it might be useful, to bring it into comparison with the Distribution of other States, who have laid themselves out upon the Equity of assigning the Order of Successions: In which some have been pretty successful. But of this hereafter; if that Hereafter should ever come, when I shall be called upon to improve these ELEMENTS into a System, and these INSTITUTES into a Digest.

P. S. What follows has a connection with the Chapter of SENATVS-CONSULTVM¹, and finds a place, with my Observations upon it, at the Instance of a great Authority: an Authority, which has the best Title to my Obedience, and which I obey with a Pleasure equal to my Duty.

¹ Above, pag. 204.

SENATVS CONSVLTVM

MARCIANVM.

Z z z

S. C. M A R C I A N V M
D E
B A C C H A N A L I B V S C O E R C E N D I S
E X
A E N E A T A B V L A
M V S E I C A E S A R E I V I N D O B O N E N S I S.

MARCIVS. L. F. S. POSTVMIVS. L. F. COS. SENATVM CONSOLVERVNT. N. OCTOB. APVD. AEDEM
DVELONAI. SC. ARF. M. CLAVDI. M. F. L. VALERI. P. F. Q. MINVCI. C. F. DE. BACANALIBVS QVEI. FOIDERATEI
ESENT. ITA. EXDEICENDVM. CENSVERE. NEIQVIS. EORVM. SACANAL. HABVISE. VELET. SEI. QVES
ESENT. QVEI. SIBEI. DEICERENT. NECESVS. ESE. BACANAL. HABERE. EEIS. VTEI. AD. PR. VRBANVM
5 ROMAM. VENIRENT. DEQVE EEIS. REBVS. VBEI. EORVM. VTR. A. AVDITA. ESENT. VTEI. SENATVS
NDSTER. DECERNERET. DVM NE. MINVS. SENATORIBVS. C. ADESENT. *quome* A. RES. COSDLERETVR
BACAS. VIR. NEQVIS. ADIESE. VELET. CEIVS. ROMANVS. NEVE. NOMINVS. LATIN. NEVE. SOCIVM
QVISQVAM. NISEI. PR. VRBANVM. ADIESENT. ISQVE. DE. SENATVOS. SENTENTIAD. DVM. NE
MINVS. SENATORIBVS. C. ADESENT. QVOM. EA. RES. COSOLERETVR. IOVSISENT. CENSVERE
10 SACERDOS. NEQVIS. VIR. ESET. MAGISTER. NEQVE VIR NEQVE. MVLIER. QVISQVAM. ESET
NEVE. PECVNIAM. QVISQVAM. EORVM. COMOINEM *habuisse*. VELET. NEVE. MAGISTRATVM
NEVE. PROMAGISTRATVO. NEOVE. VIRVM. *neque mulierem*. QVIQVAM. FECISE. VELET
NEVE. POSTHAC INTER. SED. CONIOVRA *se neque* COMVOVISE. NEVE. CONSPONDISE
NEVE. CONPROMESISE VELET. NEVE. QVISQVAM FIDEM INTER. SED. DEDISE. VELET
15 SACRA. IN. DQVOLTOD. NEQVISQVAM. FECISE. VELET. NEVE. IN. POPLICOD. NEVE. IN
PREIVATOD. NEVE. EXSTRAD. VRBEM. SACRA. QVISQVAM. FECISE. VELET. NISEI
PR. VRBANVM. ADIESET. ISQVE. DE. SENATVOS. SENTENTIAD. DVM NE. MINVS
SENATORIBVS. C. ADESENT. QVOM. EA. RES. COSOLORETVR. IOVSISENT. CENSVERE
HOMINES. PLOVS. V. OINVORSEI. VIREI. ATQVE. MVLIERES. SACRA. NE. QVISQVAM
20 FECISE. VELET. NEVE. INTER. IBEI. VIREI. PLOVS. DVOBVS. MVLIERIBVS. PLOVS. TRIBVS
ARFVISE. VELENT. NISEI. DE. PR. VRBANI. SENATVOSQVE. SENTENTIAD. VTEI. SVPRAD
SCRIPTVM EST. HAICE. VTEI. IN. CONVENTIONID. EXDEICATIS. NE. MINVS. TRINVM
NOVNDINVM. SENATVOSQVE. SENTENTIAM. VTEI. SCIENTES. ESETIS. EORVM
SENTENTIA. ITA. FVIT. SEI. QVES. ESENT. QVEI. ARVORSVM. EAD. FECISENT. QVAM. SVPRAD
25 SCRIPTVM. EST. EEIS. REM. CAPVTALEM. FACIENDAM. CENSVERE ATQVE VTEI
HOCE. IN. TABOLAM. AHENAM. INCEIDERETIS. ITA. SENATVS. AIQVOM. CENSUIT
VTEIQVE. EAM. FIGIER. IOVBEATIS. VBEI. FACILVMED. GNOSCIER. POTISIT. ATQVE
VTEI. EA. BACANALIA. SEI. QVASVNT. EXSTRAD. QVAM. SEI. QVID. IBEI. SACRI. EST
ITA. VTEI. SVPRAD SCRIPTVM EST. IN. DIEBVS X. QVIBVS. VOBIS. TABELAI. DATAI
30 ERVNT. FACIATIS. VTEI. DISMOTA. SIENT IN AGRO. TEVRANO.

THE SENATVS CONSVLTVM, of which I have here exhibited an exact Copy, is very curious, in point of its high Antiquity, and no less valuable, in regard to its Contents.

It was first published by *Jacobus Gronovius*, before his Edition of *Cicero* 1692, from a Copy, which He had from the Library of *Joh. De Witt*.

He was followed by *Fabretti*, who inserted it in his *Inscriptions*¹, ' pag. 427. A. 1699, according to a Copy, which He received from *Augustinus Scilla* a Painter.

These Transcripts alone were the Exemplars (for no other seems to have been publicly known at that Time), which *Hearn* made use of, in his Edition of *Livy*, A. 1708², *Le Clerc* after him, in an Edition He gave of the same Author, A. 1710³, and *Scipio Maffei* in his *Istoria Diplomatica*. A. 1727⁴.

¹ T. VI. pag. 237.
² Tom. V. ad pag. 460.
³ pag. 125.

In the Year 1729, that excellent and accomplished Civilian, *Corn. van Bynkershoek*, who appears not to have been Master of a correcter Copy, than the foregoing, published it a-fresh with a Juridical Comment, intitled *De Cultu Religionis Peregrinae*, following the Tenor and Substance of the Decree (which led him, as a Lawyer, to consider the Question of TOLERATION) but not neglecting other Considerations of it.

Thus was it often published, without any Voucher for its Authority, not very correctly at first, and less so afterwards, as the Errors multiplied by Transcribing. The History of it is this: About the Year 1640, a Copper-Plate, on which were the Contents I here give *literatim*, was dug up in the Territories of *J. Bapt. Cigala*, in the Kingdom of Naples; and lay for some time neglected with that Family (excepting the Copies which had been taken of it, as we have seen just now) till about the Year 1727; when the Original was presented, by a Descendant of that Nobleman, to the Imperial Library at Vienna, where it now remains.

In the Year 1729, *Matthaeus Aegyptius*, a Neapolitan, gave it the public from this Original, with a very curious Critical Commentary. Part of which Commentary (it is to be lamented, not the whole of it, for the Book is scarce with us here: I could never procure a Sight of it) was reprinted in the VIIth Volume of *Livy*⁵, set out by *Drakenborch* A. 1738—1745, and is attended with a delicate *Fac Simile* of the Original Inscription, from whence I have taken my Copy in the foregoing Page.

The Observations of *Aegyptius* are extremely valuable, explain several Points in the Roman Language and Orthography, and are of Use in illustrating the History of that memorable Event⁶, which gave Occasion to this very valuable Decree.

⁵ Liv. XXXIX. 8.—19.

When I have added, that *Funccius* in the Year 1735, reprinted this Inscription in his *Origines Linguae Latinae*⁷, and *Muratori* in the *Novus Thesaurus Inscriptionum*⁸ at Milan 1739, 1740. I have given the whole of its History, as to the Subject of Publication.

⁷ T. I. pag. 326.
⁸ Classis. VIII. P. DLXXVII.

I now transcribe it in the popular Method, and in a more modern Orthography, for the greater ease of my Readers :

[Q.] *Marcius Lucii Filius, Spurius Postumius Lucii Filius, Consules, Senatum consuluerunt Nonis Octobris apud aedem Bellonae*

(Scribendo adfuerunt M. Claudius Marci Filius, Lucius Valerius Publici Filius, Q. Minucius Caii Filius)

DE BACCHANALIBVS.

QVI foederati essent, ita edicendum censuere. Ne quis eorum Bacchanal habuisse velit*. Si qui essent, qui sibi dicerent necesse esse Bacchanal habere, iis uti ad Praetorem Urbanum Romam venirent, deque iis rebus ubi eorum verba audita essent, uti Senatus noster decerneret : dum ne minus Senatoribus Centum adessent, quum ea Res consuleretur.

Bacchas Vir ne quis adiisse velit Civis Romanus, neve Nominis Latini, neve Sociorum quisquam, nisi Praetorem Urbanum adiissent, isque de Senatus sententia, dum ne minus Senatoribus Centum adessent, quum ea res consuleretur, iussissent, censuere.

Sacerdos ne quis vir esset, Magister neque Vir neque Mulier quisquam esset, neve pecuniam quisquam eorum communem habuisse velit, neve magistratum, neve pro magistratu, neque virum, neque mulierem quisquam fecisse velit, neve posthac inter se conjurasse, neve convovisse, neve conspondisse, neque compromisisse velit, neve quisquam fidem inter se dedisse, velit. Sacra in occulto ne quisquam fecisse velit, neve in publico neve in privato, neve extra urbem sacra quisquam fecisse velit, nisi Praetorem Urbanum adiisset, isque de Senatus sententia, dum ne minus Senatoribus centum adessent, quum ea res consuleretur, iussissent, censuere.

Homines plus quinque universi viri atque mulieres sacra ne quisquam fecisse velit, neve interibi viri plus duobus, mulieribus plus tribus, adfuisse velint, nisi de Praetoris Urbani Senatusque sententia, uti supra scriptum est.

Haecce uti in Conventione edicatis ne minus trinum nundinum, Senatusque sententiam uti scientes essetis, eorum sententia ita fuit.

Si qui essent, qui adversum ea fecissent, quam supra scriptum est, iis rem capitalem faciendam censuere.

Atque uti hocce in tabulam ahenam incideretis, ita Senatus aequum censuit. Vtque eam figi jubeatis, ubi facillime nosci possit.

Atque uti ea Bacchanalia figa sunt, extra quam siquid ibi sacri est, ita uti supra scriptum est, in diebus decem quibus vobis tabellae datae erunt, faciatis uti dismota sient in agro Teurano.

* The word in the third Line of the Inscription VELET may possibly be *vellet*, not *velit*. For the Orthography of that Age consisted in using single Letters for double ones, as well as in using the E for the I. And I am the rather inclined to this, upon second thoughts, because we have ESET, l. 10. in the same construction, and which admits of no Doubt, or Ambiguity.

After

After I have presented my Reader with the Text, He will reasonably expect the Comment.

And first for the History of it :

The Bacchanalian Mysteries, a Scheme of Greek Extraction, had lately made their Way into Rome. The main ingredient in them, in order to practise upon the Weakness and Curiosity of the Vulgar, was the Possession of a Secret, communicable to None but the Initiated : They were gilded over with some Professions of a religious Worship, to support their Credit : and in a short time, became the Fashion. And that perhaps prevailed over every other Consideration besides. These Meetings continued for some time, possibly, inoffensive. But when the Numbers increased, and neither Sex stood excluded from the Society : when they laid themselves open to all the Insinuations of Intemperance, the Suggestions of Opportunity, and the Authority of Example, It became the Scene of the greatest Horror, Debauchery, and Profligacy, that is to be met with in the Records of any Age or Country. I should be concerned to see so valuable a Writer, as *Livy*, suffer by a bad Translation, and have therefore set before my Reader that Description, as it stands in the Original'. 'XXXIX. 8.

Graecus ignobilis in Etruriam primum venit, nulla cum arte earum, quas multas ad animorum corporumque cultum nobis eruditissima omnium Gens invenit ; Sacrificulus et Vates: nec is qui aperta religione propalam, et quaestum et disciplinam profitendo animos horrore imbueret, sed occultorum antistes sacrorum. Initia erant, quae primo paucis tradita sunt : deinde vulgari coepta per viros mulieresque. Additae voluptates religioni vini et epularum, quo plurimum animi illicerentur. Quum vinum animos, et nox, et mixti semines mares, aetatis tenerae majoribus, discrimen omne pudoris exstinxissent, corruptelae primum omnis generis fieri coeptae, quum ad id quisque quo natura pronioris libidinis esset, paratam voluptatem haberet. Nec unum genus noxae, supra promiscua ingenuorum feminarumque erant : sed falsi testes, falsa signa, testimoniaque et indicia ex eadem officina exhibant. Venena indidem intestinaeque caedes : ita ut ne corpora quidem interdum ad sepulturam exstarent. Multa dolo, pleraque per vim audebantur. Occulebat vim, quod prae ululatibus, tympanorumque et cymbalorum strepitu, nulla vox quiritantium inter supra et caedes exaudiri poterat. Hujus mali labes ex Etruria Romam, velut contagione morbi, penetravit. Primo urbis magnitudo capacior patientiorque talium malorum ea celavit : tandem indicium hoc maxime modo ad Postumium Cos. pervenit——

And a little below :

§ 13.

Primo Sacrarium id feminarum fuisse, nec quenquam virum eo admitti solitum. Tres in anno statos dies habuisse, quibus interdiu Bacchis initiarentur. Sacerdotes invicem matronas creari solitas. Pacullam Miniam Campanam sacerdotem omnia, tanquam Deum monitu, immutasse. Nam et viros eam primum suos filios initiasse, Minium, et Herennium Cerrinios. Et nocturnum sacrum ex diurno, et pro tribus in anno diebus quinos singulis mensibus dies initiorum

initiolem fecisse. Ex quo in promiscuo sacra sint, et permixti viri feminis, et noctis licentia accesserit; nihil ibi facinoris, nihil flagitii praetermissum. Plura virorum inter sese, quam seminarum esse stupra. Siqui minus patientes dedecoris sint, et pigriores ad facinus, pro victimis immolari: nihil nefas ducere, hanc summam inter eos religionem esse: Viros velut mente capta cum jactatione fanatica corporis vaticinari, matronas Baccharum habitu crinibus passis cum ardentibus facibus decurrere ad Tiberim, demissasque in aquam faces (quia vivum sulphur cum calce insit) integra flamma efferre. Raptos a Diis homines dici, quos machinae illigatos ex conspectu in abditos specus abripiant. eos esse, qui aut conjurare, aut sociari facinoribus, aut stuprum pati noluerint. Multitudinem ingentem, alterum jam prope populum esse: in his nobiles quosdam viros feminasque. Biennio proximo institutum esse, ne quis major viginti annis initiaretur. Captari aetates et erroris et stupri patientes.

It is not of absolute Necessity in this Place to describe the Steps by which this Affair came to the Knowledge of the Consul. That is circumstantially told by my Author, in a very affecting Relation, which every one of my Readers, I am satisfied, will turn to, before He attends me any farther in this Subject. He will meet there with the discreet and steady Measures, by which that Magistrate managed the Discovery: his great Conduct and Resolution in crushing this most abominable Society: a very pathetic and spirited Address to the People upon the Occasion: and lastly the Resolutions of the Senate, which produced this famous Decree, the Subject of my present Considerations.

There are other Authors besides *Livy*, who mention this Event.

*Quo in genere severitatem Majorum Senatus vetus Auctoritas de Bacchanalibus, et Consulium, exercitu adhibito, Quaestio Animadversioque declarat*³.

³ Cic. II. de Legg. 15.

*Bacchanalium Sacrorum mos novus institutus, cum ad perniciosam vesaniam iretur, sublatus est*⁴.

⁴ Valer. Max. I. 3. init.

*Consimili severitate Senatus postea usus Sp. Postumio Albino, et Q. Marcio Philippo Coss. mandavit, ut de his, quae sacris Bacchanalium incestu usae fuerant, inquirerent. A quibus cum multae essent damnatae, in omnes cognati intra domos animadverterunt; lateque patens opprobrii defermitas severitate supplicii emendata est. Qua quantum ruboris Civitati nostrae mulieres turpiter se gerendo incusserant, tantum laudis graviter panitae adtulerunt*⁵.

⁵ Id. VI. 3.

*Liberum Patrem cum mysteriis suis Coss. Senatus auctoritate non modo Vrbe, sed universa Italia eliminaverunt*⁶.

⁶ Tertullian. Apoleget. C. 6.

So St. Austin⁷,

⁷ VI. de C. D. 9.

Bacchanalia summa celebrantur insania. Vbi Varro ipse confitetur, a Bacchantibus talia fieri non potuisse nisi mente commota. Haec tamen postea displicuerunt Senatui saniori, et ea jussit auferri.

And

And again⁶,

⁶ XVIII. 13.

Et tamen ejus velut Dei nomine per immundos daemones Bacchanalia Sacra, vel potius Sacrilegia, sunt instituta, de quorum rabiosa turpitudine post tam multos annos sic Senatus erubuit, ut in urbe Romana esse prohiberet.

The old and valuable Scholiast upon *Juvenal* alludes to this History also:⁷

⁷ Ad II. Sat. 3.

Qui Curios simulant, et Bacchanalia vivunt.

Criminose vivunt: id est, qui sub figmento severitatis sunt impudici. Nam Sacra Bacchanalia ex iis condemnata sunt, cum probatum esset Senatui honestissimas feminas ad Stimulae Deae lucum faede adulterari.

Before We leave this Passage, it may be proper to observe, that instead of *ex iis*, which is in the vulgar Text of this Gloss, and signifies nothing, We should substitute *EX S. CTO*, meaning the Decree before us. This was the Sagacity of *Pitboeus*, who deserves so well of *Juvenal* and his Scholiast: though some may prefer his second Thoughts, viz. *EX XII*: the XII. Tables, the old Constitutional Law of the Country, upon which the Senate formed this Decree. That such Meetings as these were forbidden by the Law of the XII. Tables, We have the Authority of *Portius Latro*, in his Oration against *Cataline*, if that Oration be of any Authority:

Primum XII. Tabulis cautum esse cognoscimus, NE QVIS IN VRBE COETVS NOCTVRNOS AGITARIT: deinde Lege Gabinia promulgatum, QVI COITIONES VLLAS CLANDESTINAS IN VRBE CONFLAVISSET MORE MAIORVM CAPITALI SVPPICIO MVLTARETVR⁸.

⁸ § 19.

For *Duodecim* simply, is sometimes the expression of the Romans for the XII. Tables: As *Tully*⁹,

⁹ II. de Legg. 23.

Discebamus pueri XII. ut carmen necessarium.

And so it is in *Festus*,

Portum in XII. pro Domo positum omnes fere consentiunt. Cui Testimonium defuerit, is tertiis diebus ob portum obvagulatum ito.

The *Dea Stimula* mentioned here by the Scholiast, is avowed also by *St. Austin*¹. *Ovid* seems to have had some doubt concerning the Name²,

¹ IV. de C. D. 11.

² VI. Fast. 503.

*Lucus erat, dubium SEMELAE, STIMVLAENE vocetur;
Maenadas Ausonias incoluisse ferunt.*

In the History We are upon, as it is recorded in *Livy*, it is neither the one nor the other, but *Simila*:

Si

*Si vera dicere inducere in animum posset, negat perturbari debere : fidem vel a Sulpicia, tali femina, vel ab se acciperet. expromeret sibi, quae in luco Similae Bacchanalibus in sacro nocturno solerent fieri*³.

³XXXIX. 12.

A great deal has been said to this Point, by the Writers upon these two Passages of *Livy* and *Ovid*. An Inscription produced by *Car. Neapolis* in his Notes upon the Latter, and the Authority of *Sextus Rufus de Regionibus Urbis*, who mentions such a place at Rome, as the *LVCVS SEMELES*, sets the matter out of all Doubt. The Inscription was first produced by *Mazochius*, and stands thus in *Gruter*⁴ :

8.

DIIS MANIB.
M. CAECILIO SP. F. SVC. RVFO.
SOLIARIO. AB. LVCO SEMELES
EX TESTAMENTO EIVS
CALVISIA ZOSIME ET
M. CAECILIUS CALIPPVS
HEREDES FECER.

⁵ XI. 94.

To which I add another from *Reinesius*⁵.

M. ANTONIVS M. LI
BERTVS EBORARIVS
A LVC. SEMEL. FECIT
SIBI ET ANTONIAE
LATINAE CONIVGI
SVAVISSIMAE.

The Romans had Groves planted round their Temples or Chapels, to encrease the Solemnity and Religion of the Place. In their Writers, and Antiquities I find mention of several : Many of which are omitted by those who set themselves upon drawing up an Account of them. The *Lucus Semeles* particularly, the Scenes of these midnight Revels, was in the XIth Region or Ward, entitled the Ward of the *Circus Maximus* : and by its Situation near the River's Side, We find the Consistency of this passage in *Livy*, lately cited : *Matronas Baccharum habitu, crinibus sparsis, cum ardentibus facibus decurrere ad Tiberim, demissasque in aquam faces, &c.*

To close my Narrative : *Servius* therefore must be mistaken in his ⁶ V. Ecl. 29. Note upon this passage of *Virgil*⁶,

*Daphnis et Armenias curru subjungere tigres
Instituit, Daphnis thiasos inducere Bacchi,
Et foliis lentas intexere mollibus hastas.*

Where He says that the *Bacchanalian* Rites, or the Worship of *Bacchus*, were introduced at Rome by *Julius*. He may possibly mean some religious part of this Ceremony restored by that Emperor, without the Abuse. But even of that there is no farther Tradition, that I know of.

I have collected all that is necessary or material for the Historical View of this Record. My observations will be directed first to the Orthography, Style and Latinity of it: And I shall then regard it in a Juridical Light, as an Act of Senate, and consider the Manner, the Form, and the Contents of it.

I need not mention what Improvements Learning has received from a careful Perusal of its early Monuments. He, who is ignorant of this, is unacquainted with the Merits of some of the most considerable Scholars, that have written on this side the Restoration of Letters. It is not only an Entertainment for the Curious, to observe how a Language wore down its Disadvantages and Impediments, and by degrees burnished into Perfection: but a Scholar and a Critic is bound to see it in its Rationale, and first Principles, in what, I think, the Philosophers call the *Naked Form*. For it is in Criticism, as it is in Physic: No medicine can be applied successfully, without some knowledge of the Constitution.

To instance in *Homer*: There are two Passages in that Author, which generally pass over disregarded; and two Passages in the Scholiast [*Didymus*] upon them, which would pass over without being understood, by all such who are Strangers to the Circumstances of the Greek Literature, at the time that *Homer* wrote.

In the Copies that prevail now, I believe, universally, We read^r,

^rOdyss. A. 51.

Θεὰ δ' ἐν δώμασι ναίει,
Ατλανῖος θυγάτηρ ΟΛΟΟΦΡΟΝΟΣ, ΟΣΤΕ Θαλάσσης
Πάσης βένθεα οἶδεν, ἔχει δέ τε κίονας αὐτὸς
Μακράς, αἱ γαῖαν — *

Possibly the Epithet belongs to *Calypso*, and not to *Atlas*, her Father. So the Scholiast thought at least. But then how shall a common Reader understand him?

Εγέγραπτο ΚΑΤΑ ΤΗΝ ΑΡΧΑΙΑΝ ΓΡΑΦΗΝ, ΟΛΟΟΦΡΟΝ. Εἴτα τις μὴ νοήσας προσέθηκε τὸ ὅς.

The Meaning of this will be: when *Homer* wrote, there was no *Ωμέγα*. Therefore this Epithet, if directed to *Calypso*, stood thus:

Ατλανῖος θυγάτηρ ΟΛΟΟΦΡΟΝ, ὅς τε Θαλάσσης.

But a distant Transcriber not knowing how this could stand consistently with Metre, and an Expedient being in readiness, in the first syllable of the following word, to satisfy his scruples, He jumbles two words together, and presents us with

Ατλανῖος θυγάτηρ ὀλοόφρονΟΣ, ΟΣΤΕ Θαλάσσης.

* Dea vero in aedibus habitat,
Atlantis filia versuti, qui maris
Totius profunditates novit, sustinetque ipse columnas
Longas, quae tellurem —

2 Odyss. A.
274.

Again⁷,

Μνηστῆρας μὲν ἐπὶ σφέτερα σκιδνάδαι ἀνωχθί.
ΜΗΤΕΡΑ δ', εἰ οἱ θυμὸς ἐφορμᾶται γαμέεσθαι,
ΛΨ ΙΤΩ εἰς μέγαρον πάρος μέγα δυναμένοιο.*

* One would expect to find Μητήρ δ' ἂν ἴτω· and so indeed *Homer* gave it in Effect: But having no H in his Alphabet, as it is certain He had not, and the Word closing with an E, the Copyist was led to mend what He did not understand, and for ΜΗΤΕΡ, wrote ΜΗΤΕΡΑ. This is the Account given of the Matter by *Didymus*, if He was but restored to himself. In the old Orthography, says He, They wrote ΜΗΤΕΡ (or ΜΕΤΕΡ) instead of what We now should write ΜΗΤΗΡ. And thence came the Mistake. *Didymus*, upon this Hypothesis, wrote as follows.

ΤΗΙ ΑΡΧΑΙΑΙ ΣΤΗΝΘΕΙΑΙ ἐγγράψο ΜΗΤΕΡ, ἀντὶ τῆς ΜΗΤΗΡ.
Τῷτο ἀγνοήσας τις προσέθηκε τὸ α'.

Yet of *Homer*: For what follows, may be worth Observation.

Γαῖα δ' ὑπεσονάχιζε, Διὶ ὡς τερπικεραύνῳ
Χωρόμενῳ, ὅτε τ' ἀμφὶ Τυφώϊ γαῖαν ἱμάσση
Εἰν Ἀρίμοις, ὅθι φασὶ Τυφώϊ εἴμμεναι εὐνάς.
Ὡς ἄρα τῶν ὑπὸ ποσσὶ μέγα σοναχίζετο γαῖα δ.†

* Iliad. B. 781.

There is a line dropt between the two last, which is still acknowledged by several old Writers: and I apprehend it was dropt, because it was of too hard a Digestion for those who had no Stock or Foundation in the Greek Literature, but lived, as We call it, from Hand to Mouth. It is probable that it once ran thus:

Εἰν Ἀρίμοις, ὅθι φασὶ Τυφώϊ εἴμμεναι εὐνάς,
Χώρῳ ἐνὶ δρυόντ', ΙΟΥΔΗΣ ἐν πόλει δῆμῳ.

A learned Writer of our Country, and a Writer of no small Merit, is convinced, that the Scene of Action, to which *Homer* alludes, lay in Syria, and that *Typhoeus* is *Og*: And indeed *Αρίμοις*, which has its Name from *Aram*, one of the children of *Sbem*, plainly shews it, and by Expositors and Geographers it is frequently understood so. This led that Writer to consider, that *Homer* here must mean *Judaea* or *Palestine*. Now the Word *Judaea* must be expressed by *Homer* in what Letters He had before him,

* *Procos quidem ad propria abire jube:*
Matrem autem, si ipsi animus incessit nubere,
Redeat in domum patris multum potentis.

† *Terra autem resonabat, ceu a Jove, qui fulmine gaudet,*
Quando irascitur, et quando circa Typhoeum terram caedit
In Arimis, ubi dicunt Typhoei esse cubilia:
Sic horum sub pedibus valde strepebat Terra.

viz. ΙΟΔΗ: and in Process of Time, the O, which for a while denoted the Diphthong ΟΥ, when that Diphthong was introduced, gave place to it, and then it became ΙΟΥΔΗ:

Χώρα ἐνὶ δρυόεντ', ΙΟΥΔΗΣ ἐν πείονι δήμῳ.

This was too much for his Transcribers, and, in the Frequency of Copies, the Line was either totally suppressed, or in others, the I of Ιόδης (or Ιέδης) was lost in the final of δρυόεντι, and so it turned up Ὑδης, to the no small Embarrassment of Geographers. In which Condition We find this discarded Verse, whenever it is quoted, as in *Strabo*⁹ and *Eustathius*¹: ⁹ Lib. XIII. pag. 229.

Χώρα ἐνὶ ΔΡΥΟΕΝΤΙ, ὙΔΗΣ ἐν πείονι δήμῳ.

Upon this View of the Greek Orthography We may venture to read², ¹ ad Homer. l. c. and again ad B. 866.

Νῦν δ' ἐτέρως ΕΒΟΥΛΟΝΤΟ θεοὶ, κακὰ μῆϊόνωντες.

For so the Scholiast reads, and so also He expounds it, viz. Ηβέλοντο. And this moreover is perfectly the Genius of Aeolism. *Aeoles* ΘΟΥΓΑΤΗΡ *dicunt pro* ΘΥΓΑΤΗΡ, & *corripientes*³. ² Odyss. A. 234.

Thus, We need not be startled at

Δῶρα παρ' Αἰῶλες μεγαλήτορος⁴.

Βῆν εἰς Αἰῶλες κλυτὰ δώματ' αἶψα⁵.

³ Priscian l. 1. col. 554.

⁴ Odyss. K. 36.

⁵ Ibid. 60.

For here the Writing was O, the Pronunciation was ΟΥ. So again,

Εἰν ἐνὶ δίφρῳ ἐόντας⁶.

Οὔτε ποτ' Εἰν ἀγορῇ δίχ' ἐβάζομεν, ἅτ' Εἰν βελῇ⁷.

Εἰ βάλλει Κυθήρειαν, Ἀργά τε, Τυδεΐ⁸ υἱός⁸.

⁶ Iliad. E. 160.

⁷ Odyss. r.

⁸ Argum. Iliad. E.

what we imagine to be the Diphthong, is no more than the Power of the Pronunciation. For *Homer*, a Stranger to Diphthongs, wrote

Εἰν ἐνὶ δίφρῳ ἐόντας.

Οὔτε ποτ' Εἰν ἀγορῇ.

Εἰ βάλλει Κυθήρειαν.

We are assured, that the following Words were not wrote, in his Time, thus: Οὐλομένην. Νῆσ⁹. Οὐλύμποιο, etc. but with the simple Element, ΟΛΟΜΕΝΗΝ. ΝΟΣΟΝ. ΟΛΤΜΠΟΙΟ.

Can We imagine, that the Greek Language, in the Simplicity of its first Ages, had both Ετάρες and Εταίρες?

Ἀρνύμεν⁹ ἦν τε ψυχὴν ἔ νόσον ΕΤΑΙΡΩΝ.

Ἀλλ' ἔδ' ὥς ΕΤΑΡΟΥΣ ἐρρύσατο⁹.

⁹ Odyss. A. 5.

Upon the whole, a Man that sits down to *Homer*, must read him in his own Alphabet, and not scrutinize his Text, by Powers and Characters, by those Helps and Conveniencies of Language, which were introduced after his Age, and of which it is not possible He should have any Idea.

The Roman Language, having found more Friends and Followers among the Moderns, has had its Originals better examined. By the Industry of Many, who have set their Hands to the Work, it has been traced up to its Sources: The Channel has been scoured; and Medals, Monuments and Antiquities, together with some Notices left us by the Ancients themselves, who gave into these Searches, have nearly reduced it to a System. However, though much has been done, I should be glad to see a Collection of such Remains, as preceed, or at least are not lower than, the Age of *Augustus*, under whom the Language settled. These accurately set out, and diligently compared, the one with the other, would furnish out many Observations to Men of much Leisure, which would be of great Service to those that have less.

I do not by this mean to insinuate that nothing of this kind has been already done. For I set out upon these Reflections, with observing, that

¹ In Columnae
Rostratae In-
scriptionem
Explicatio, a-
pad Graev.
Thes. Antiq.
Rom. Tom.
IV. col. 1811.

² Lipsius.
Graevius, etc.
See Funccius
de Orig. L. L.
Tom. I. pag.
300.

³ Liv. XLII.
20.
Servius ad
Virg. III.
Georgic. 29.

much had been done *well*. The Merit of *P. Ciacconius*¹ and others², upon the oldest Monument of Rome, *viz.* the *Columna Duilliana*³, erected at the close of the Century before that, which produced our *S. Ctum*, is considerable. (When I call this the oldest Monument of Rome, I am not ignorant, that there are some which *pretend* to be older.) Near in time to the Monument of *Duillius*, indeed the Year following, is that of *L. Scipio Barbatus*. As it is perfect and more intelligible than the Other, I here present it to the Reader:

HONC OINO PLOIRVME COSENTIONT R.
DVONORO OPTVMO FVISSE VIRO
LVCIOM SCIPIONE FILIOS BARBATI
CONSOL CENSOR AIDILIS HIC FVET A
HEC CEPIT CORSICA ALERIAQ. VRBE
DEDET TEMPESTATEBVS AIDE MERETO.

i. e.

*Hunc unum plurimi consentiunt Romae
Bonorum optimum fuisse virum
Lucium Scipionem. Filius Barbati
Consul, Censor Aedilis hic fuit.
Hic cepit Corsicam Aleriamque urbem:
Dedit Tempestatibus Aedem merito.*

This owes much to *Sirmond* and *Aleander*. The Explanation of the Former was printed, without his Name, in the fourth Volume of *Graevius*' *Thesaurus*, and is besides in the fourth Volume of his Works, together with the additional Notes of *Aleander*. See also *Graevius*' Edition of *Florus*, A. 1702. and *Hearn*'s of *Livy* 1708. *Mabillon*⁴, *Fabretti*⁵, *Gualthe-*
⁴ De Re Di-
plom. Suppl.
cap. 3. pag. 14.
⁵ Inscript.
pag. 461.
⁶ Tabb. Sc.
pag. 152.

To these I add what *Matth. Aegyptius* has struck out upon the *S. Ctum* before us: the valuable Remarks of Cardinal *Noris* upon the *Cenotaphia Pisana*: several attempts⁷ upon that Sovereign Record, and, I was near adding, the most precious Remain of all Antiquity, the *Marmor Ancyranum*.

But many yet remain not spoken to: some *Tabulae Agrimensoriae*, and Fragments of *Leges Agrariae*⁸. A *Lex Socialis*, or the Form of a Treaty, copied first by *Smetius*, then printed by *Aldus Manutius*⁹, by *Sigonius*¹, by *Brissonus*², and *Gruter*³. Many *Laws*, *Plebiscita*, and other Monuments produced by *Vrsinus*, *Sigonius*, *Boissard*, and *Brissonus*: Some of which however should be admitted with Caution. These, I say, and many such, well set out, would present us with a very good Idea of the Principles of the Roman Language, and would be a creditable and useful Work for a Scholar to undertake. And I should assume some little Merit to myself, if this Suggestion should set so good a Design a-foot.

What I have to offer, of this kind, upon the Inscription before me, at present, is not much. I will endeavour to keep as clear as possible, of what has been observed before.

It may not be improper to suggest, that our *S. Ctum*, compared with the *Columna Rostrata* of *Duillius*, justifies an Observation that the Ancients have left us⁴, viz. That the Letter *G* was introduced into their Alphabet by one *Sp. Carvilius Ruga*, who was supposed to live about the Year 520. For in Ours of the Year 567, we constantly find it, and in the *Duillian* of 493, it is as constantly expressed by *C*, as *MACISTRATOS*, *CARTACINIENSIS*, *EXFOCIONT*, for *MAGISTRATVS*, *CARTHAGINIENSES*, *EXFVGIVNT*.

*Pro G apud antiquos C poni solitum, ut pro Agro Gabino, Cabino, pro Lege, Lece, Acna pro Agna. Auctio certe ab augendo dicta est: et numeri cum habeant C, ut Ducenti, Trecenti, Sexcenti, G reliqui habent, ut Quadringenti, Nongenti: cum a tertio quoque ordine, ut apud Graecos quoque, positum est C pro G: et suo loco K, post receptum G, supervacuum coepit esse*⁵.

This Passage of *Victorinus*, with many more that might be produced of the other Grammarians, shews us the Connection between these two Letters of the Roman Alphabet *C* and *G*, and in the last Part of it acquaints us, that by this means, another Letter in that Alphabet became superfluous, and unnecessary. However an Use was found out for it:

K similiter ociosa ceteris sermonibus:

*Tunc in usu est; quum Kalendas adnotamus, aut Kaput*⁶.

Chishul. Antiqq. Afiat. pag. 165. seq. Fabricii Imp. Caes. Augusti Temporum Notatio. Hamb. 1727. 4.
⁷ See above, pag. 458. ⁸ in Orthographia, pag. 407. ¹ De antiquo Jure Provinc. I. 10. ² De Formulis, pag. 168. Edit. Fol. ³ pag. D. et DI. ⁴ Plutarch. Quaest. Rom. 54. ⁵ Marius Victorin. pag. 18. Edit. Commelin. ⁶ Tarentian. Maurus, l. 796.

K, says that Author, is generally superfluous, indeed in all Words, except such as *Kalendae*, *Kaput*. That is thus: When the Vowel, which follows is the Vowel of the Consonant, or that with which it is sounded, as *KAlendae*, *KAput* (for it is the Nature of all Mute Consonants to be pronounced, by beginning with their own Power, and ending with some one Vowel) so often will the Consonant itself stand to denote the whole Syllable, as *Klendae*, *Kput*. Now *C* on the other hand, which *Suidas* calls *κάππα Ῥωμαϊκὸν*⁷, as it takes a different Vowel to express itself by, might stand alone, to denote such Words as form their first Syllable with that Vowel; and this is upon the same Principles, as *K* did before.

⁷ v. XAA-MYE.

Multis vocalibus instantibus, quoties id verbum scribendum erat, in quo retinere hae literae nomen suum possent, singulae pro syllaba scribantur, tanquam satis ea ipso nomine explerent: ut puta, Decimus per D simplex et cimus: item Cera, C simplex, et ra: et Bene, B et ne. Ita et quoties Kanus et Karus scribendum erat, quia singulis literis primae syllabae notabantur, K prima ponebatur, quae suo nomine A continebat; quia, si C posuissent, Genus et Cerus futurum erat, non Canus et Carus.

⁸ Terentius Scaurus.

K et Q quae nonnullis superfluae videntur, hanc habent rationem, ut K tunc praepnatur, quando eam A sequitur; sed hoc in paucis nominibus observatur, ut Klendae, Krtbago.

⁹ Sergius.

K Consonans muta supervacua, qua utimur, quando A correpta sequitur, ut Klendae, Kput, Klumnia.

¹ Diomedes. Add. Scalig. ad Euseb. Chronic. Lipsius de Re-cta Pronunc. L.L. Cap. 13.

And this, I am persuaded, was the Ratio or Principle of the Hebrew Pronunciation also, before the Introduction of Points. Every Consonant carried its own Vowel along with it.

Now though all that these Grammarians say, be rational, yet We have not been favoured with any Examples of this Sort in the Remains of Roman Antiquity. And indeed by the Expression, which *Terentianus* makes use of, it appears to me rather, that they used the *K* as a Mark or Cifra, to stand, itself, for such Words, as *Kalendae*, *Caput*, *Calumnia*, etc.

Qui K expellunt, notam dicunt esse magis quam literam, qua significamus Kalumniam, Kaput, Kalendas. Hac eadem nomen Kato notatur. Non magis igitur in numero literarum esse oportere, quam illam notam, qua Centuria, et quam 3 conversum, quo Caia significatur; quod notae genus videmus in Monumentis, cum quis libertus mulieris ostenditur.

² Velius Longus de Orthograph. col. 2218. Edit. Putsch. ³ Pro Sex. Roscio Amerino. §. 20.

And this was possibly the Brand for Calumniators, or False Accusers at Rome: which well explains this Passage of *Cicero*³.

Sin autem sic agetis, ut arguatis aliquem patrem occidisse, neque dicere possitis, aut quare, aut quomodo; ac tantummodo sine suspitione latrabit;

trahitis; crura quidem vobis nemo suffringent; sed si ego hos bene novi, literam illam, cui vos usque eo inimici estis, ut etiam eas omnes oderitis, ita vehementer ad caput affigent, ut postea neminem alium, nisi fortunas vestras accusare possitis.

Here, when We find in the old Editions, and some MSS. *ut etiam calumnias oderitis*, that Disagreement in the Text (the Word *Calumnias*) was possibly owing to some Traces or Tradition of *Cicero's* true Meaning in this Passage. I must not forget however, that a very eminent Critic lays hold of this Reading, and ingeniously enough corrects it thus, *ut etiam Cal. omnes oderitis*: as if *Cicero* alluded to their bad Circumstances, and their Apprehensions of the Kalends, when the Interest of Money became due. I have many Reasons against that Alteration: and it is not the weakest, when I observe, that the Passage is capable not only of a consistent, but even of a very fine, Sense, without it: *They bore so strong an Antipathy to the Letter K (for a particular reason) that they detested the whole Alphabet for its sake.*

But to proceed in my principal Observation, which was the Powers of C and G, it must be noted, that a considerable Light has been thrown upon some Passages in the Digest, and many Places happily restored in it, by comparing those two Letters together, in which *Rad. Fornerius*⁴ has been particularly successful. The true and precise Date, when the Latter of those two Consonants was introduced, we have seen above. The Tradition seems to be incontestable, and this *S. Ctum* is now doubtless the earliest Monument where that Letter appears.

For the Roman Alphabet was not perfected at once: though I think it was furnished with all the necessary Letters at the Date of our Inscription. For of those which are doubtless the *least* so, X. Y and Z, the First is manifestly here in more Places than one, EXDEICENDVM. EXTRAD. EXDEICATIS (as it is also in the *Duillian*), and We have no reason to conclude from any thing that occurs in this Monument, against the Existence of the other two in the Alphabet, at this Period of Time. And This is a strong Reproof of those who have maintained, that the Romans had no use of X. Y and Z. till the Age of *Augustus*:

X Litera usque ad Augusti tempus non erat, sed pro ea C et S scribebant. — A Graecis duas Augustus literas mutuavit Romanis; Y et Z: et hae usque ad Augusti tempus non scribebantur, sed pro Z duas SS. ponebat, pro Y vero I scribebant.

And such was the Mistake also of *Isidore* before him. The two last indeed, Y and Z. at what time soever introduced, are of use only in Translations from the Greek:

*Nibil Ausoniis esse opus Y sonare dixi,
Et Ζῆτα supremum, nisi Graia verba cogent.*⁶

They were therefore never considered as a Part of the Roman Alphabet.

⁷ Quintilian I. Nostrarum ultima X, qua tamen carere potuimus, si non quaesivissimus⁷.
⁴ X Novissime a Latinis assumpta post omnes ponitur literas, quibus Latinae dictiones egent.

⁸ Priscian. lib. 1. init.

And indeed the little use that These were of, makes me conclude, that it is of the last Letter of our Alphabet, that *Shakespeare* is to be understood in his *King Lear*; where he says:

Thou whorson ZED! Thou unnecessary Letter!

But that those Grammarians are mistaken in regard to Z also, as well as X, when they tie these Letters down to the Period I was mentioning, is plain from a Writer of that Class, but of a higher Merit:

Mibi videtur nec aliena Sermoni fuisse [Z] cum inveniatur in Carmine Saliari⁹.

⁹ Velius Longus col. 2217.

But to proceed: X therefore, and such like double Consonants, though not of that Necessity, as to be coeval with the Language, were yet of that Conveniency, that they could not be wanted long. It was some Time, before the Greeks themselves procured them: and till that Improvement came, both Greeks and Latins wrote, what they had to write of this sort, with two Consonants instead of one:

Graeci, priusquam reciperent in ordinem literarum suarum ξ et ψ, eas quidem voces, in quibus apparebat Γ, ut αἶξ αἶγος, φλόξ φλογος, et similia, scribebant per γς [ΑΙΓς], in quibus vero incidebat K, ut ἀνάξ ἀναξ, δόναξ δοναξ, et similia, per κ et σ [ΑΜΑΚς]. In quorum delinatione inerat B, ut Αραψ Αραβς, per ε et σ [ΑΡΑΒς]. Et in quibus Π, Κύκλωψ Κύκλωπς per ω et σ [ΚΥΚΛΩΠς]. Similiter Nostri, voces, quae in x literam incidunt, si in declinatione earum apparebat g, scribebant g et s, et CONIVGS, LEGS, et similia, per g et s. At quae voces ψ literam habent, hae per b et s scribebantur, si in declinatione acciperent b, ut COELEBS coelibis, PLEBS plebis. Posteaquam a Graecis Ξ, et a nobis x recepta est, abiit et illorum et nostra PERPLEXA RATIO: et in primis observatio Nigidii, qui in libris suis et x litera non est usus, antiquitatem sequens¹.

¹ Victorinus. pag. 26. Edit. Comelin.

And it is remarkable, that as the Greeks provided a Figure to express Πς, viz. Ψ, (as well as Ξ for Γς or Κς); so the Emperor *Claudius*, introduced a Figure also for the same purpose, in the Alphabet of his own Country, which however was afterwards laid aside².

² See *Marmor Sandvic.* pag. 46.

So that in the Roman, as well as the Greek, and all other Alphabets besides, there are some Letters of Necessity, and some of Conveniency. It is the Intention of all, to take in the whole Variety of Sound and Expression (though not always effected) and it has been the Art of many to throw in

in some compendary Marks, as double Consonants, *etc.* which express more Sounds than one.

To this Consideration may be subjoined the Use of attributing one Mark only to the different Powers of the Vowels, whether longer or shorter. The Greeks, when they gave a different Form to their long E, and their short one, and so again to the O, multiplied the Tale of their Vowels, beyond most Languages besides :

*Nulla vox humana constat absque septem literis,
Rite vocales vocavit quas magistra Graecia:
Quicquid audis praeter istas, pars soni, non vox erit.
Quinque contenta est figuris Romuli Latinitas.
H et Ω longas enim nos non habemus literas,
Nec breves semper vocamus his duas contrarias¹.*

¹ Terentian.
Maur. l. 1293.

And yet it is very well known (and this Inscription shews it) that the old Romans distinguished sometimes between the Long Vowels and the Short ones, not indeed by a new Figure, but by giving the long one, the Form of a Diphthong. As here, QVEI. SEI. FOIDERATEI. EXDEICENDVM. VOBIS DEICERENT. CEIVIS. INCEIDERETIS. EEIS. OINVORSEI. VIREI, for *Qui, Si*, etc.

So *Priscian*²:

² col. 561;

I quoque apud antiquos post E ponebatur, et EI diphthongum faciebat, quam pro omni I longa scribebant, more Graecorum.

But this being less necessary, and the Roman (I) serving both Purposes, as well as the Greek *ἰωρα*, the following Ages wore down the Practice gradually ; and though they sometimes made use of the old Method, yet at last they finally forgot it. So that about the *Augustan* Aera, We meet in Medals and Inscriptions both with

CIVIBVS SERVATEIS.

and

OB CIVIS SERVATOS.

In like manner, as this Plate presents us with a long I, and a short one, so also do We find a long V, in the Words IOVSISENT. CONIOVRASE. IOVBEATIS. PLOVS. NOVNDINVM. This, I say, was generally the System of the early Ages: for, when *Priscian* wrote, one V served for all purposes :

Ponitur Litera V in Graecis nominibus, modo loco OΥ diphthongi, ut Musa pro Μῆσα, modo pro O correpta, ut Homerus pro Οὔρος, pro eadem producta, ut Fur pro Φῶρ.

However, when the Roman Writers had to do with Greek, They preserved this Distinction between the Long V and the Short one. For *Numa*

³ See Dionys. made Νομῆς, when it was to be translated³, but *Fulvius* Φέλσιος. The *Cru-*
Halie lib. II. *flūmeri* is an instance of both together: for *Dionysius* has it, Κρησομερινοί.
 παλλim.

We have Instances also, in the Inscription before us, of the ancient
 Simplicity, in their single Consonants, BACANALIBVS. BACAS. ESENT.
 HARVISE. ESE. FECISE. ESETIS. ADESENT. IOVSISENT. CONIOVRASE.
 COMVOVISE. FACILVMED. *etc.* Upon which may be consulted, among
 others, *Quintilian*⁴, and *Havercamp*⁵.

⁴ I. 7.

⁵ Praef. Thef.
 Morell.

We have here also, as in the *Duillian*, and down as far as *Plautus*,
 Words terminated with D, as in SENTENTIAD. SED. EAD. EXSTRAD.
 SVPRAD. COVENTIONID. FACILVMED. So We come, in the Roman
⁶ Priscian col. 559. Latinity, by *Redigo*, *Redarguo*, *Redimo*, *Prodest*⁶, and by SVPRADSCRI-
 PTVM in this S. Ctum. before us, if that be one Word, and not two.

We find ARFVISSE, ARVORSVM, for *Adfuisse*, *advorsum*: a great
⁷ I. c. Mark of Antiquity. *Antiquissimi* (says *Priscian*⁷) *pro AD frequentissime AR*
ponebant, *Arvenas*, *Arventores*, *Arvocatos*, *Arfines*, *Arvolare*, *Arfari di-*
centes, *pro Advenas*, *Adventores*, *Advocatos*, *Adfines*, *Advolare*, *Adfari*.
Vnde ostenditur recte Arcesso dici ab Arcio verbo, quod nunc Accio dicimus,
quod est ex Ad et Cio compositum.

⁸ II. 3.

In the 26th Line We meet with AHENAM. Thus *Gellius*⁸ informs us,
 that He saw a Copy of *Virgil*, *mirandae antiquitatis* (supposed to be *Vir-*
⁹ Il. Aen. 469. *gil's own Book*), *In quo duo isti duo versus⁹, cum ita scripti forent*

Vestibulum ante ipsum, primoque in limine Pyrrhus
Exsultat telis, et luce coruscus aëna,

¹ I. Georg.
 296.

additam supra vidimus h literam, et ahenam factum: sic in illo quoque Virgilii
versu¹, in optimis libris scriptum invenimus,

Aut foliis undam tepidi despumat aheni.

That Correction was very early, for *Gellius* does not forbid the Suppo-
 sition, that it was made by *Virgil* himself, or by his Authority. The
 Place of *Gellius* is liable to some Ambiguity, as *Pierius* has observed upon
 the former Passage of *Virgil*. However it evinces the Orthography of this
 Inscription, and is a Proof of what *Card. Noris*, in his incomparable
 Work, has observed, that the Copies of *Virgil*, and indeed of all other
 Authors whatsoever, are to be brought to this Touchstone, the original
 autograph Inscriptions, which are the safest and best Guides in adjusting
 these Niceties. And such they will always be found, upon the whole,
 though even These are open to human Frailty and Inaccuracy: as when
 this Record exhibits SACANAL, COSDLERETVR, NEOVE, NDSTER,
 DQVOLTOD, NECESVS, and perhaps NOMINVS, *etc.* for *Bacanal*, *Cosole-*
retur, *Neque*, *Noster*, *Oquoltod*, *Necesum*, *Nominis*. So possibly, IOV-
 SISENT [lin. 9. et 18.] for *Jousisset*.

In

In the next Line We read GNOSCIER POTISIT. Of the latter Expression¹ it is trivial to observe, that it is the Origin of *possit*, i. e. *potis sit*. I have something to remark upon the former. *Gnoscier*, or, in the more modern Latinity, *Nosci*, is the same with *Legi* — *Vbi facillime legi possit*. Thus, like *Ἀναγιώσκειν* of the Greeks, *Cognoscere* with the Romans, signifies *to Read*, and is so used by the best Authors of Latin. Somewhere in *Tully*, *Brutus* is said *totum cognovisse Demosthenem*. We find in ² *Dialog. de Tacitus*, *Auctores cognoscere*. *Nepos* has, *Librum*³, *Epistolam*⁴, *Scripta*⁵, *Literas*⁶ *cognoscere*. We have *Literas cognoscere* in *Sallust*⁷ and *Cicero*⁸. So *Vlpian*⁹.

² Dialog. de
Orat. c. 29.
³ in Lyfand.
fin.

⁴ Pausan. c. 4.

⁵ Conon. c. 4.

⁶ Datam. c. 5.

⁷ Jugurth. 76.

⁸ I. de Orat. 4.

⁹ D. 50. 16. 36.

Cognoscere Instrumenta est relegere et recognoscere.

The Words NEVE MAGISTRATVM NEVE PRO MAGISTRATVO [lin. 8.] support an Observation I made at the Entrance of this Work¹, concerning a remarkable Construction in the Roman Language. I say it is something analagous to *Exconsule*, *Exquaestore*, when we read here *Magistratum*, and immediately following, *Pro Magistratu*. So *Cicero*²: *Cum Proconsule in Ciliciam proficiscens Athenas venissem*.

¹ pag 38.

² I. de Orat.
18.

And *Valerius Maximus*³:

³ VIII. 15.

Eques Romanus Proconsule in Hispaniam adversus Sertorium pari imperio cum Pio Metello principe Civitatis missus.

P. AQVIVS SCAEVAE ET FLAVIAE
FILIVS
CONSI. ET DIDIAE
NEPOS
BARBI ET DVRICIAE
PRONEPOS
SCAVRA
QVAESTOR DECEMVIRATIVM
LITIVM IVDICANDARVM
TRIB. PLEB. AEDIL. CVRVL.
IVDEX QVAESTIONIS. PRAETOR AERARI
PROCONSVLE PROVINCIAM
CYPRVM OBTINVIT etc.⁴

⁴ Gruter.
CCCLX. 3.

The other Variations here from the common System of Latinity have nothing in them very extraordinary, and have been often spoken to: Such are

S. C. MARCIANVM.

CONSOLVERVNT	i. e.	<i>Consuluerunt.</i>
COSOLERETVR		<i>Consuleretur.</i>
DVELONAI		<i>Bellonae.</i>
HAICE		<i>Haec or Haecce.</i>
AIQVOM		<i>Aequum.</i>
TABELAI		<i>Tabulae or Tabellae.</i>
DATAI		<i>Datae.</i>
OINVORSEI		<i>Vniuersi.</i>
SENATVOS		<i>Senatus.</i>
PRO MAGISTRATVO		<i>Promagistratu.</i>
QVES		<i>Qui pl.</i>
QVIQVAM		<i>Quisquam.</i>
	etc.	

And thus much for my Literary Remarks upon this valuable Remain:
I come now to consider more expressly the Contents.
It sets off in this Form:

[2.] *Marcus Lucii Filius Philippus, Spurius Postumius Lucii Filius Albinus, Consules, Senatum consuluerunt Nonis Octobribus apud Aedem Bellonae (Scribendo adfuerunt Marcus Claudius Marci Filius, Lucius Valerius Publii Filius, Quintus Minucius Caii Filius) de Bacchanalibus.*

The last Words *De Bacchanalibus* I consider, in some measure, as the Title of the Act: and yet not to stand so distinct, but to be referred for Construction to the foregoing Words *Senatum consuluerunt*. The manner
⁵ D. 16. 1. 2. is much the same, though the Diction differs, in the *SCtum Velleianum*⁵.

1.

Quod Marcus Silanus et Velleius Tutor Consules verba fecerunt DE OBLIGATIONIBVS FEMINARVM QVAE PRO ALIIS REAE FIERENT, quid de ea re fieri oportet, de ea re ita censuerunt etc.

⁶ apud Cicer.
VII. Fam. 8.

So *Caelius*⁶,

Quod M. Marcellus Consul V. F. [i. e. verba fecit] DE PROVINCIIS CONSVLARIBVS, D. E. R. I. C. etc. i. e. de ea re ita censuere.

Again: By *Bacchanalibus* here I understand neither the *Personae Bacchantes*, the Bacchanalian Rioters, as some do; nor the *Liberalia*, the *Orgia*, the Rout itself, often termed *Bacchanalia*; but the *Sacraria*, or *Places of Meeting*. Thus at the conclusion of this Inscription:

BACANALIA VTEI DISMOTA SIENT IN AGRO TEVRANO.

So

So Livy¹.

¹ XXXIX. 15.

Bacchanalia tota jam pridem Italia, et nunc per urbem etiam multis locis esse.

And again⁸,

⁸ §. 16.

Demolientes nos Bacchanalia, discutientesque nefarios coetus cerneretis.

And⁹,

⁹ §. 18.

Datum Consulibus negotium est, ut omnia Bacchanalia Romae primum, deinde per totam Italiam diruerent.

So Isidore in his Glosses :

Bacchanal, Sacrarium Liberi Patris.

And Plautus¹,

¹ Aul. III. 1.
6.

Atat ! perii hercle ego miser : aperit Bacchanal.

The *SCtum* begins in the usual Stile of these Records, viz. the Names of the Consuls, who made the Proposal, or addressed the Senate : the exact Date both of Time and Place : and lastly the Attestation or Subscription of some considerable Members, expressed in these Words : *Scribendo adfuerunt M. Claudius*, etc. Though this last is the Form of many *S. Cta*, yet I apprehend it to have been not of universal practice, or the most absolute necessity. It is probable, that Matters only of Consequence were thus distinguished. Such were not trusted to the Notary alone, but for greater Solemnity, the Instrument was formally attested by some of the principal Senators : as our Returns to Parliament are by Indenture of some of the Constituents, or capital Burgeesses. This, I think, is a more plausible Reason than what I have seen assigned by a very good Writer, who takes this to be the Practice under the Republic, and discontinued afterwards. But Time has nothing to do with it : The following preserved by *Fabretti*² is low enough in Age, and yet preserves the Form I was mentioning. ² pag. 612.

L. NOVEMB. L. NONIVS RVFINVS POMPONIANVS Q. VESONIVS FVSCVS P. I. D.
SCRIB. ADF. C. LVCRETIVS HELVIANVS M. TREBIVS PROCVLVS L. CAMMIVS MAXIMVS
S. C. CVM PRONA VOLVNTATE HONESTISSIMO ANIMO VLTRO C. POLLIO III. VIR. I. D.
IN PROXIMVM ANNV M PROFESSVS SIT QVO FACTO HAESITATIONI PVBLICAE IN PARTEM
MORAM ADEMERIT PLACERE EI QVO MAGIS ETIA CAETERI AD BENEFACIENDVM IN REPVBICA.
— PROVOCENTVR STATVAM EQVESTREM AVREAM IN FORO N. PONI CENSVERVNT,
PRIM. CENS. C. LVCRET. HELVIANVS.

³ Traet.
Traet. Tow. I.

Whoever desires to compare the Decree of Senate now under consideration, with others of the People of Rome, will find a pretty good Collection ready at hand, made first of all by *Placentinus*³, and afterwards, ⁴ De Legg. et SCtis. Lugdun. 1592. 4. ⁵ De Formul. lib. II. See also *Cicero*

³ VIII. Fam. 8. *Cicero*¹, *Frontinus*⁴, *Gellius*⁵, *Suetonius*⁶, *Vrsinus*⁷, and the express Words of fundry in the Digest, under their respective Titles: sc. *Ad SCtum MACEDONIANVM*⁸, *VELLEIANVM*⁹, and elsewhere. One of the fullest and most perfect there is a *SCtum*¹ under *Hadrian*, preserved by *Vlpian ad Edictum*, who preserved indeed, in that Work, most of the rest.

⁵ XVI. 11.
⁶ De Clar. Rhetor. init.

⁷ Not. ad Augustin.

⁸ D. Lib. XIV. Tit. 6.

⁹ D. Lib. XVI. Tit. 1.

¹ D. 5. 3. 20. 6.

To proceed: The first Clause of the Act or Decree runs thus:

[Iis] *qui Foederati* [P. R.] *sint, ita edicendum censuere. Nequis eorum Bacchanal* [Aedem] *habeat: Si qui sint, qui dicerent id necesse esse* [sc. si ea religione tenerentur] *iis* [edicendum censuere] *ut Romam venirent ad Praetorem Urbanum; et eorum oratione audita* [for so is to be read, *VBI EORVM VERBA AUDITA ESSENT*] *uti de iis statueret Senatus Romanus, Centum ad minus praesentibus.*

The Form and Manner here is very observable, *CENSUERE*, the Term of Art for the Judgment, Resolution or Decree of Senate; For so the Books of Notes² have it D. E. R. I. C. *De ea re ita censuere*: and so it occurs in several forms preserved to us. Now as *Censuere* relates to the Act of the Legislators, so *Edicendum* regards the Magistrate, and tends towards Execution. The Consul, Praetor, Cenfor, or Aedile pronounced or proclaimed for observation, what the People or Senate had enacted for Law.

² Probus, etc.

C. Fannio Strabone, M. Valerio Messala Coss. SCtum de Philosophis et de Rhetoribus Latinis factum est.

M. POMPONIVS PR. S. C. QVOD V. F.
DE PHILOSOPHIS ET DE RHETORIBVS
D. E. R. I. C. VTEI M. POMPONIVS
PR. ANIMADVORTERET COIRARETQVE
VTEI E. E. R. P. F. S. V. VTEI ROMAE
NEI ESSENT.

³ eie Rep. fideque sua videretur.

Aliquot deinde annis post id SCtum Cn. Domitius Aenobarbus. et L. Licinius Crassus Cenfores de coercendis Rhetoribus Latinis ita EDIXERVNT.

⁴ Gell. XV. 11. Sueton. de Cl. Rhetor. init.

RENVNCIATVM EST, etc⁴.

I have to observe moreover upon this Clause, that it contains the Resolution of the Roman Senate in regard to the Temples, or Places of holding these Assemblies; and directs the Conduct of their *Foederati*, their Allies and Confederates. This was surely *Satis pro Imperio*. But so it stands. The Roman Citizen together with the *Socius Nominis Latini*, and all other *Socii* whatever, are considered afresh in the next Article. This directs therefore, that such States or People, who pleaded Prescription, Religion or Conscience, against the Operation of this Act, should take a Journey to Rome, by their Syndics or Agents, and be heard upon their Petition. So *Livy*⁵.

⁵ XXXIX. 18.

Datum

Datum Coss. negotium est, ut omnia Bacchanalia Romae primum, deinde per totam Italiam diruerent. Extra quam si qua ibi Vetusta Ara aut Signum consecratum esset. In reliquum deinde SCto cautum est, Ne qua Bacchanalia Romae, neve in Italia essent. Siquis tale sacrum folenne et necessarium duceret, nec sine religione et piaculo se id omittere posse apud P. Urbanum profiteretur, Praetor Senatam consuleret, si ei permissum esset, quum in Senatu Centum non minus essent —

The next Article relates to the Practice and Conformity of the Subject: and Enacts

That no Roman Citizen, That no Member of the Latine Name (These were Allies of the closest Connection with the Romans) in short, That no Ally whatever, should frequent these Meetings, without a Licence, and under such other Restrictions as the Article sets forth.

BACAS VIR NEQVE ADIESE VELET are the Words of the Statute. ADIESE is *Adiisse*, and VELET is *Velit*⁶: and both together amount to⁶ Above, pag. ABOVEAT OR ADITO. BACAS stands for *Bacchas* (for double Consonants⁵⁴³. and Aspirates were novel things), and means the *Mulieres Bacchantes*, the Βάκχαί, as they are called by the Greeks: *Euripides* has a Tragedy under that Title. Thus are those Passages to be understood in *Livy*⁷, BACCHIS⁷ XXXIX. 9. *eam se initiaturam.* And⁸ *Religionis se causa, ut voto pro valetudine sua facto*⁸ Ibid. §. 10. *liberetur, BACCHIS initiari velle.* And the same Writer adds⁹, *Primo*⁹ Ibid. §. 13. *sacrarium id Feminarum fuisse, nec quenquam Virum eo admitti solitum. Tres in anno statos dies habuisse, quibus interdiu BACCHIS initiarentur. Sacerdotes invicem Matronas creari solitas: Pacullam Miniam — omnia — immutasse: nam et viros eam primum suos filios initiasse — Ex quo in promiscuo sacra sint, et permixti viri feminis, et noctis licentia accesserit, nihil ibi facinoris, nihil flagitii praetermissum.*

The next Paragraph, or Article, is grounded upon the frequent Statutes of that Country, DE COLLEGIIS ILLICITIS. For Colleges or Fraternities are understood here, by the Expressions of *Having a public Purse, of Entering into Articles, of Being subject to Rules and Ordinances — Pecuniam communem habuisse — Conjurasse — Convovisse — Conspondisse — Compromisisse — Fidem dedisse.*

All Meetings, Assemblies [*Collegia*] among the Romans were either

1. *Licita,*
2. *Illicita.*
3. Neither the One, nor the Other, but what We may call *Privilegiata.*

That is, They were such, as were neither *established* by Law, nor yet *forbidden* by it, but came under another Description, and may be said to be *allowed* or *tolerated.*

1. COLLEGIA LICITA. By these are to be understood what We now call *Incorporated Societies*, empowered by Charter or sufficient Warrant, to meet together, in order to carry on some useful business or purpose: to have a public chest; to use a common Seal; to plead and be impleaded, like a single Person.

For a College, Company or Corporation is a Society of Men so united, that, in the Operation of Law, many Individuals shall seem to constitute only one Individual.

Mortuo reo promittendi et ante aditam hereditatem fidejussor accipi potest: quia Hereditas personae vice fungitur, sicut Municipium, et Decuria, et Societas *.

* D. 46. 1. 22.

But because the primary Attention of all civilized States is to guard against the probable danger of Many combining together, no College or Society was ever looked upon to be lawful, but what was specially and expressly found by public Authority.

Of this the Words of *Caius* are a sufficient Evidence.

Neque Societas, neque Collegium, neque hujusmodi Corpus passim omnibus habere conceditur. nam et Legibus et S. Ctis et Principalibus Constitutionibus ea res coercetur. Paucis admodum in causis concessa sunt hujusmodi Corpora—Item Collegia Romae certa sunt, quorum Corpus S. Ctis atque Constitutionibus Principalibus confirmatum est—Quibus autem permissum est corpus habere Collegii, siue cujusque alterius eorum nomine, proprium est ad exemplum Reip. habere res communes, arcam communem, et Actorem siue Syndicum, per quem, tanquam in Rep. quod communiter agi fierique oporteat, agatur, fiat *.

* D. 3. 4. 1.

But it is to be observed, that if these *Collegia Licita* did in any Shape abuse this Right, or assemble to any other purposes, than what was expressed in their Grant or Charter of Incorporation, They were forthwith deemed *Illicita*; and assembled against Law.

And by an Argument *a Fortiori*, such must needs be the Case of those *Collegia*, which were only *Privilegiata*.

The Foundation of such Companys or Fraternitys is said to be a Measure of *Numa's*, who, upon his Accession, found the City torn to pieces by the two Rival Factions of Sabines and Romans.

* Εγνω κατατεμεῖν εἰς τομὰς πλείονας τὸ σύμπαν πλῆθος· Ἐκ δὲ τῶτων, εἰς ἑτέρας ἐμβαλὼν διαφοράς, τὴν πρώτην ἐκείνην ἔ· μεγάλην ἀφανίσαι, ταῖς ἐλάττωσιν ἐνδισπαρεῖσαν. Ἦν δὲ ἡ διανομὴ κατὰ τὰς τέχνας, Αὐλητῶν, Χρυσυχόων, Τεκτόνων, Βαφέων, Σκυτοτόμων, Σκυτοδεψῶν, Χαλκίων,

* Interesse putavit ut multitudinem in plures diffecaret partes, atque conjiceret ex his in alla discrimina, atque ita primum ingens illud dissidium oblitteraret distractum et disseminatum in minuta. Divisi autem civitatem per artes Tibicinum, Aurificum, Fabrorum, Tinctorum, Sutorum, Co-

Κεραμείων. τὰς δὲ λοιπὰς τέχνας εἰς ταυτὸ συναγαγὼν, ἐν αὐτὸ ἐκ πα-
σῶν ἀπέδειξε σύστημα. κοινωνίας δὲ καὶ συνόδους καὶ θεῶν τιμὰς ἀποδοῦναι
ἐκάσῳ γένει πρεσβύτας, τότε πρῶτον ἐκ τῆς πόλεως ἀνείλε τὸ λέγεσθαι καὶ
νομίζεσθαι, τὰς μὲν Σαβίνους, τὰς δὲ Ῥωμαίους¹.

Thus Those who had a Charter or Warrant, would sometimes express
that Authority.

¹ Plutarch in
Numa, pag.
155. Edit.
Bryan.

TI CLAUDIVS
CHRESIMVS. OB HON
QVINQVENNALITATIS
COLLEGIO DENDROPHOR.
ROMANOR. QVIBVS EX
S. C. COIRE LICET².
——— EX DECRETO
ORDINIS CORPORIS PISCATORVM
ET VRINATORVM TOTIVS ALV. TIBER.
QVIBVS EX S. C. COIRE LICET³.

² Boissard. VI.
pag. 104.
Gruter.
CLXXV. 8.

³ Gruter. 1
ccccxci. 1.

PIETATI
HOSTILIAE
HOSTILIANAE
VIVIR. AVG. SOCI
QVIBVS EX PERMISS. DIV. PII
ARCAM HABERE PERMISS.
PRIMAE BENEMERENTI T. V⁴.

⁴ Gruter.
CDXIX. 7.

2. Collegia illicita.

Collegia siqua fuerint illicita, Mandatis, et Constitutionibus, et S. Ctis dis-
solvuntur—In summa autem, nisi ex S. Cti auctoritate, vel Cae-
saris, Collegium, vel quodcunque tale corpus coierit, contra S. Ctum
et Mandata, et Constitutiones Collegium celebrat⁵.

⁵ D. 47. 22. 3.

Against these unlawful Assemblies We find a Law as early as the Reign
of the second Tarquin :

Συνόδους τε συμπάσας ὅσαι πρότερον ἐγίνοντο, κωμητῶν ἢ φρατριάων, ἢ
γεῖτόνων, ἐν τῇ πόλει, καὶ ἐπὶ τῶν ἀγρῶν, ἐφ' ἱερὰ καὶ θυσιάς, πάσαις
κοινῇ προσέτιπε μηκέτι συνελθεῖν, ἵνα μὴ συνιόντες εἰς τὸ αὐτὸ πολλοὶ βε-
λαὶς ἀπορρήτους μετ' ἀλλήλων ποιῶνται περὶ καταλύσεως τῆς ἀρχῆς⁶. *

⁶ Dionys.
Halic. IV. 43.

Coriarorum, Aerariorum, Figulorum, reliquas artes in unum coegit, fecitque ex omnibus cor-
pus unum, collegiaque et concilia atque sacra iunique seclae decentia attribuit. Ita primum sus-
tulit ex urbe factiones, ne hi Sabini, illi Romani vocarentur.

* Coetus omnes quotquot olim fuerint, paganorum et tribulium, vel vicinorum, tam in urbe
quam in agris, sacrorum et sacrificiorum causa initos, iis omnibus interdictum est ne aliquid
conferant, ejus rei causa, ne multi inter se coeuntes consilia clandestina invicem agitent de
Rep. evertenda.

The Romans therefore were very jealous of all such Combinations. The XII Tables restrained them, as We have seen lately : and sundry Laws and *S. Cta* afterwards. One is produced by *Asconius* upon the Oration of *Tully* against *Piso*, which passed in the Consulship of *L. Caecilius Metellus*, and *Q. Marcius Rex* A. V. C. 685. Add also the Laws lately cited⁴.

⁴D. 3. 4. 1.
47. 22. 3.

So *Julius*,

⁵Sucton. 5.
42.

*Cuncta Collegia, praeter antiquitus constituta, detraxit*⁵.

And *Augustus* :

⁶Id. in Aug.
32.

*Plurimae Factiones, titulo Collegii Novi, ad nullius non facinoris societatem coibant—Collegia, praeter antiqua et legitima, dissolvit*⁶.

⁷D. 47. 22.
1. 1.

3. *Collegia Privilegiata*. I am authorized to set out this Sort, viz. Such Assemblies, as the Law neither looked upon in the Light of *Collegia Licita*, nor *Illicita* : *Quae coire non prohibentur*, as *Marcian* expresses it⁷. These did not meet by any public authority, but were connived at only, but that however no longer, than while they kept within the Law, or, as *Marcian* continues it, *dum tamen per hoc non fiat contra S. Ctum, quo illicita Collegia arcentur*.

Thus much for the general Disposition of Law in the Section or Article before us of the *S. Ctum Marcianum*. To go over it more minutely ;

I read, *Sacerdos nequis Vir esset, Magister neque Vir neque Mulier quisquam esset*, etc.

And understand it thus :

These *Bacchanalia* being properly a Female Rite, as We have had occasion to observe lately, and *Livy* also acquainting us, that Women were the only Priests, till an Innovation was made by *Paculla*⁸ ; The Injunction of Law, at the Head of this Article, was to restrain the Male Sex from executing that Office : which Practice had been found of dangerous Consequence, and was moreover directly repugnant to the Nature of the Solemnity and the Institution. What follows there, may not be so easily apprehended.

Magister, I observe, was the common Appellation of such who presided over any Society.

*Magistrare, Moderari. Unde Magistri, non solum Doctores Artium ; sed etiam Pagorum, Societatum, Vicorum, Collegiorum, Equitum dicuntur, quia omnes hi magis ceteris possunt : unde et Magistratus, qui per imperia potentiores sunt quam privati*⁹.

⁹Festus. Add.
Gothofred.
ad D. 50. 16.
57.

S. C. M A R C I A N V M.

57¹

M. IVNIO MESSIANO
VTRICL. CORP. ARELAT.
EIVSD. CORP. MAG. IIII.
F. QVI VIXIT ANN. XXXIII.
M. V. D. X. IVNIA VALERIA
ALVMNO CARISSIMO⁴.

⁴ Gruter.
CDXXXVI. 6.
et
CDLXXXIII.
1.

SABINAE
AVGVSTAE

MAGISTRI QVINQVENNALES
COLLEGI FABRVM TIGNAR. LVST. XIII.
Q. NVMISIVS MARITIMVS
M. VALERIVS FELIX
MARCIVS CARVS
F. FLAVIS ONESIMVS
L. NAEVIVS L. F. PHILIPP.
Q. HORTENSIVS TYRANNVS
Q. LOLLIVS HERMA
IN MAGISTERIO DEFVNCTVS⁵.

⁵ Id. CCLII. 6.

We find the *Sacerdos* and *Magister* distinguished by *Livy*, *Neu quis Magister Sacrorum, aut Sacerdos esset*⁶. But here the Act of Senate with a⁶ XXXIX. 18. Precision, proper to be attended to, directs, that *No Man* shall execute the Office of *Priest* at those Rites: and that the Office of *Magister* (without mentioning or adding *Sacrorum*, as *Livy* does) shall be utterly abolished, and stand interdicted to *both Sexes*. I take it then, that One was of a Religious Turn, and the other of a Civil. As the Senate was not disposed to exterminate totally the Worship of *Bacchus* upon the religious Plan of it, We find them here therefore aiming at the Reformation of it only, and endeavouring to reduce it to that Plan accordingly: SACERDOS NE QVIS VIR ESSET, because Women were the Priests. But as under Colour of Religion, Clubs and Confederacies were maintained, which had nothing to do with it, so I take *Magister* to be something *out of* Devotion, the Sur-Intendant of those nocturnal Orgies, which the Senate was resolved to abolish, and therefore enters it into their Resolutions, MAGISTER NEQVE VIR NEQVE MVLIER QVISQVAM ESSET—NEVE MAGISTRATVM NEVE PRO MAGISTRATV FECISSE VELET: neither *GRAND-MASTER*, nor *VICE-GRAND*. And this is followed by a Recital of those Acts, which are natural to such Fraternities: *conjurasse, convocasse, conspondisse, compromississe, fidem dedisse*, etc. all of them equivalent to signing Articles; and heaped up with great Plenitude of Expression (as I have formerly observed in some similar Instances⁷) to leave no possible Room for Evasion. ⁷ Above, pag. It 240.

It follows in this Clause

SACRA IN OCCVLTO NE QVISQVAM FECISSE VELIT.

Gronovius gave it SACRA IN DEVOTOD. Fabretti, who met with another, and a better, Transcript, SACRA INDQVOLTOD. Bynkershoek, who wrought upon these two Copies, by comparing the One with the Other, and had no Original to steer by, imagines He can see a consistent Sense in Gronovius' Text, IN DEVOTO: however He prefers a Conjecture of his own, INDE VOTO. As for INDQVOLTOD, which, to use his own Words, Fabrettus vitiosissime exhibuit, et quod Nemo intellexerit, He entirely discards it. Now this turns out the true Reading at last; I mean it is the true Representation of the Copper, though the Workman failed in his Duty. For by a kind of Fatality in his Art, this is the third time, in this short compass, that he has given us a D for an O. IN DQVOLTOD, lege IN OQVOLTOD, or, in the more modern Orthography, occvlto.

By this the Senate meant *clandestinely; retiring from public notice*, and avoiding all kind of Inspection. The PRIVATO which follows, may seem to some, to answer that sense, but does not. The Provision of the Act in that place relates to the Circumstance of the House, the Room, or the Building: *Let there be no Clandestine Meetings of this sort, either in any public Building, or private Apartment.*

*Above pag.
470.

This may be thus perhaps better conceived. Places of Worship were either *Public* or *Private*; either set apart by public Authority, or assigned to that Purpose by the Will of the Owner. As We have therefore formerly⁸ distinguished between *Res Sacras* and *Religiosas*, upon the Plan We may distinguish between *Aedes Sacras* and *Religiosas*: which corresponds to *Publicas* and *Privatas*.

IVNONIBVS SACRVM
M. MAGIVS M. L. AMARANTVS
IIII VIR ET
MAGIA M. F. VERA MAGIA M. L. ILIAS
AEDEM SIGNA III. PORTICVM MARCERIS II.
CVLINA ET LOCVM IN QVO EA SVNT
VOTVM SOLVERVNT
LOCO PRIVATO⁹

* Gruter.
XXIV. 21

Here again, was a Licence provided for tender Consciences. The Magistrate was to be acquainted with the Scruples, and to lay them before the Senate: by whose Authority He might issue out his Licence: For here, as before, there can be no Sense or Construction, unless We read IOVSIS ET, and refer it to the Praetor.

The

The next Article sets off with a great difficulty in the Copy which *Gronovius* had from the Papers of *John de Witt*: HOMINES PIDVS V. OINVORSEI. *Fabretti* had it exactly right PLOVS, agreeably to our *Fac Simile*. This again was fatally neglected by *Bynkershoek*, who goes to work upon the faulty Text of *Gronovius*, and strikes out from thence OMNES P. IDVS V. i. e. *Prid. Idus Quintil.*

When that Writer says, that the Sense is hurt by *Fabretti's* Reading, if the Words *Plus Quinque* are applyed to what follows, viz. *Two Men and Three Women*, I can not possibly understand him. For can there be a greater Consistency than in an Injunction conceived in these Terms? viz.

These religious Assemblies shall not consist of more than Five of both Sexes, upon any Account whatsoever. Of which, the Number of Men shall not exceed Two, nor the Number of Women, Three.

Most that I have been saying, will be confirmed by *Livy*, who gives us a short Abstract of this Conclusion of Senate.

XXIX. 18.

In reliquum deinde S.Cto cautum est: Ne qua Bacchanalia Romae neve in Italia essent: Siquis tale sacrum solenne et necessarium duceret, nec sine religione et piaculo se id omittere posse apud Praetorem Urbanum profiteretur; Praetor Senatui consuleret, si ei permissum esset, quum in Senatu Centum non minus essent, ita id sacrum faceret, dum ne Plus quinque sacrificio interessent: neu qua pecunia communis, neu quis Magister sacrorum, aut Sacerdos esset.

I see no reason again, that *Bynkershoek* had to quarrel with the Word MULIERIBVS. It is possible indeed, that the Workman might be misled by the Terminations DVOBVS, TRIBVS, to give it MULIERIBVS also, as that Writer observes: But at the same time, He will not dispute the Latinity of this Passage, *Viri plus duobus, Plus tribus mulieribus* —

The next Article is conceived thus:

Haec ut in Concionibus vestris edicatis per tres Nundinas, atque ut Senatus Romani Sententiam probe et efficaciter intelligatis, hoc eodem S.Cto cautum est et provisum.

This was a Direction to the Magistrates of the Subordinate States how to conform themselves upon this juncture. For Copies of the Decree were doubtless sent to all the great Corporations in the Roman Dominions at that Time: differing only in the last Word: In AGRO TEVRANO; which seems to stand in the Place of the Address or Direction of the Instructions. And the Plate, now at Vienna, was infallibly the Duplicate or Counterpart of the S.Ctum, which the Magistrate of that District, the Ager Teurranus, ordered to be engraved according to the Tenor of the Decree in these words: ATQVE VTI HOC IN TABVLAM AENEAM INCIDERETIS, ITA SENATVS AEQVVM CENSUIT. Most of this, I say, appears from the Clause

Claufe before us : where we fee the Zeal of the Romans in fuppreffing this Mifchief, wherever their Power extended, according to the Words of
² XXXIX. 14. *Livy*², *Edici praeterea in Vrbe Roma, et per totam Italiam Edicta mitti : NE QVIS, QVI BACCHIS, etc.*

The Article before us, it muft be obferved, closes with the Words EORVM SENTENTIA ITA FUIT : as does One of the following with ITA SENATVS AEQVVM CENSVIT. Either of them Equivalent or Tantamount to CENSVERE above. Thus would they often vary their Expreffions in their public Forms and Infruments.

The next Paragraph contains the Penal Sanction :

Whoever fhall offend againft the Premiffes, is by this prefent Aét of Senate declared guilty of a Capital Offence.

The following, as I obferved, directs that Copies fhould be taken of this Decree in Copper, the ufual Method of recording their public Aét, or folemn Proceedings.

⁵ Cic. III. Philip. 12.

*Decreta in Aes incidenda et in Capitolio figenda curaverit*⁵.

Almost in the very Language of our Decree.

*Vfus Aeris ad perpetuitatem Monumentorum jampridem translatus eft, tabulis aereis in quibus publicae Constitutiones inciduntur*⁶.

⁶ Plin. XXXIV. 9.
⁷ D. 48. 13.

*Qui tabulam aeream——refixerit——lege Julia peculatus tenetur*⁷.

⁸ ad Pompon.

de O. 1. pag.

349.

⁹ Praef. III.

Vol. Thef. Jur.

Rom. pag. 4.

² Praef. ad

Part. IIltiam.

Antiqq. Rom.

² De Capi-

tolio. Cap. 30.

³ de Legg. c.

38.

⁴ IV. Mifcell.

12.

⁵ D. 1. 2. 2.

⁶ §. 4. eod.

Much has been collected upon this Head by feveral, *Aegyptius* upon this very *S. Ctum*, *Mucien*⁸, *Otto*⁹, *Hotoman*¹, *Ricquius*², *Manutius*³, *Brodacus*⁴, and others. I have not been wanting in this Confideration, nor in procuring Materials for the Illuftration of that curious Remain under the Name of *Pomponius*⁵; which contains, but under the difadvantageous Circumftances of Incorreétnefs, the earlieft Hiftory of the Roman Law, now any where to be found. It is ftrange that That Author fhould contradict the exprefs Authority of *Livy*, and the known Practice of Antiquity, when in his Account of the XII. Tables, He has the following Words⁶.

Quas in Tabulas Eboreas perſcriptas pro Roſtris compoſuerunt, ut poſſent Leges percipi.

It is well known that the Romans made ufe of Copper for thefe Purpoſes, both before and after this Period, as *Livy* and others tell us, They did here. And I have ſome reaſon to think, that they had not the ufe of Ivory ſo early: nor can I ſee how it could be well uſed for that purpoſe, if They had. Some Writers upon this paſſage, have been inclined to ſubſtitute *Roboreas*: Which is certainly far preferable to the received Reading in *Pomponius*' Text.

The Article, that follows next, relates to the Publication of this Decree, and contains nothing very obſervable or very extraordinary upon that Subject.

The

The Final or Concluding Paragraph, besides the difficulty of the *Ager Turanus* (in which point *Aegyptius* has laboured successfully) has met with more Doubts, than one would reasonably expect from it. By the History of this Transaction, by the Words of *Livy*, and the Contents of this *S. Ctum*, We find it was the Resolution of Senate, to restrain the Abuses of these Ceremonies, but to maintain at the same time a Tendernefs for all that looked like Religion, or old Constitution. The Words of *Livy*³ are :

³XXXIX. 18.

Datum Negotium Consulibus, ut omnia Bacchanalia primum Romae, deinde per totam Italiam diruerent, extra quam si qua ibi vetusta Ara aut Signum consecratum esset.

Nearly in the Style and Manner of this Decree,

BACCHANALIA SI QVA SVNT EXTRA QVAM SI QVID IBI SACRI EST
——— FACIATIS VTI DISMOTA SINT IN AGRO TEVRANO.

I have gone through the most material and interesting Traits of this *S. Ctum*, and may possibly, at greater leisure, consider it more distinctly and accurately. My Reader, at the close of these Observations, may not possibly be displeased to find, (for the sake of Comparison) the most perfect Form perhaps, This only excepted, of an old *S Ctum*. And though it belongs not to Rome itself, but to one of their *Municipia*, It has not the least Deviation, in Manner and Form, from the public Instruments or *S.Cta* of the great Metropolis.

L. ARRVNTIO STELLA CoS
L. IVLIO MARINO

XIII. K. NOV.

M: ACILIVS PLACIDVS L. PETRONIVS FRONTO

IIII VIR I. D. S. C. ⁴ FERENTINI IN CVRIA AEDIS MER
CVRI SCRIBVNDQ ADFVERVNT Q. SEGIARNVS MAE
CIANVS T. MVNNIVS NOMANLINVS

⁴ i. e. Juri
dicundo
Censili.

QVOD VNIVERSI V. F. ⁵ T. POMPONIVM BASSVM CLARIS
SIMVM VARVM DEMANDATAM SIBI CVRAM AB
INDVLGENTISSIMO IMP. CAESARE NERVA TRAIANO
AVGVSTO GERMANICO QVA AETENITATI ITALIAE
SVAE PROSPEXIT SECVNDVM LIBERALITATEM EIVS
ITA ORDINARE VT OMNIS AETAS CVRAE EIVS MERITO
GRATIAS AGERE DEBEAT FVTVRVMQVE VT TANTAE

⁵ verba fecero.

VIRTVIS

S. C. MARCIANUM.

* i. e. Quid
de ea re fieri
placeret. de ea
re ita censuere

VIRTUTIS VIR AVXILIO SIT FUTVRVS MVNICIPIO
NOSTRO Q. D. E. R. F. P. D. E. R. I. C. *
PLACERE CONSCRIPTIS LEGATOS EX HOC ORDINE
MITTI AD T. POMPONIVM BASSVM CLARISSI
MVM VIRVM QVI AB EO IMPETRENT IN CLIEN
TELAM AMPLISSIMAE DOMVS SVAE MVNI
CIPIVM NOSTRVN RECIPERE DIGNETVR
PATRONVMQVE SE COOPTARI TABVLA
HOSPITALI INCISA HOC DECRETO IN DOMO
SVA POSITA PERMITTAT. CENSVERE.
EGERVNT. LEGATI
A. CAECILIVS A. F. QVIRINALIS ET
QVIRINALIS F.

See Jac. Phil. Toma-
fin. de Tesseris
Hospitalitatis.
Gli Arronzii
di Zabarella.
pag. 23.
Vrsin. Ap-
pend. ad Ant.
Augustin. de
LL. et S. Ctis.
Gruter.
CCLVI. 1.
Gorii In-
script. Antiq.
Flor. pag. 65.

From a Copper Plate in the *Medicean Collection* *.

NOW from all that We have seen, from the History of this great Transaction, and from the Resolution of the Senate upon it, thus preserved to us in its original State, nothing can be more certain than this Conclusion, viz.

That the Prohibition, or Interdict in this Decree did not directly lye against the Profession of a Religion, considered as such, nor any Meetings upon that Account; but that the State only took the fair and reasonable Measures to guard itself, and maintain the public Security.

But the Assembly, which gave birth to this Decree, was the greatest Alarm which could possibly happen of that Nature. When not a Few, but, as it were, a People *; when several Thousands of the most profligate Characters, associated without Law, clandestinely, and, what finished the horror of the Idea, by Night, the Government saw there was nothing, which they might not apprehend.

The *Bacchanalian* Mysteries were ever of this unlucky Completion.

Π. Τὰ δ' ἱερὰ, νύκτωρ, ἢ μεθ' ἡμέραν, τελεῖς;
Δ. Νύκτωρ τὰ πολλὰ. σεμνότητ' ἔχει σκότος *.

*Qualis commotis excita sacris
Thyas, ubi audito stimulant Trieterica Baccho
Orgia, nocturnusque vocat clamore Citbaeron* *.

Nycteliumque patrem, nocturnaue Sacra precare *.
*Non hac Trieterica vobis
Nox patrio de more venit* *.

* Eurip.
Bacch. 485.

* Virg IV.
Aen. 301.
* Ovid I.
Art. Am.
567.
* Stat. II.
Theb. 661.

* P. Haec vero Sacra noctu an interdiu facis?
D. Noctu plerumque. Tenebrae enim habent aliquid augusti.

They were upon this Account called *Nyctelia*¹, and the Deity They worshipped, as We have just now seen, *Nyctelius Pater*. There is a remarkable Passage in *Plutarch*⁴:

Διὸ τῶν μὲν Ολυμπίων ἱερῶν εἰργεῖται [*Hedera*] καὶ ἔτε ἐν Ἡρας Αθήνησιν, ἔτε Θήβησιν ἐν Αφροδίτης ἰδοὶ τίς ἀν κίττον ἄγριον, ἰοῖς δὲ καὶ ΝΥΚΤΕΛΙΟΙΣ, ὧν τὰ πολλὰ ΔΙΑ ΣΚΟΤΟΥΣ δρᾶται, πάρεστιν.*

It is manifest, that, corrupt as the Place is, We can see the Sore; and We have an easy Method of healing it. IOIS therefore is nothing but the Termination of some Festival, corresponding to ΝΥΚΤΕΛΙΟΙΣ: and as We are assured, what Festival it was, I have no scruple in restoring the *Bacchanalia*, ΔΙΟΝΥΣΙΟΙΣ δὲ καὶ ΝΥΚΤΕΛΙΟΙΣ ——— πάρεστιν.

Something more of these *Nyctelia*. *Servius* upon the passage of *Virgil* lately cited, has this Gloss:

Nocturnus] *Nocte celebratus: unde ipsa Sacra Nyctelia dicebantur, quae Pop. Rom. exclusit causa turpitudinis.*

The Historical Allusion here is probably to our *SCtum*: But the *Turpitude* was not the only Motive for restraining these nocturnal Routs; but more especially the Danger arising from the Time of holding them. Of which the Romans were always apprehensive, even to a great degree. Besides the Ingenuity of those, who have made Laws for *Romulus*, and enacted under his Name,

NOCTVRNAS IN TEMPLO VIGILIAS NE HABENTO.

(Be that as it may) We are satisfied, that such was the Attention of the *Decemviri*, as We had lately occasion to observe⁵, and of the *Lex Gabinia* also: of which perhaps no farther Account is come down to us, than what I have exhibited in that place, upon the Authority of *Porcius Latro*⁶.

From the Constitutions of his Country I question not but *Cicero*⁷ caught it:

NOCTVRNA MVLIERVVM SACRIFICIA NE SVNTO.

Who a little below⁸ subjoyns the Justification of that Appointment: § 15.

Omnia nocturna, ne nos duriores forte videamur, in media Graecia Diagondas Thebanus lege perpetua sustulit. Novos vero Deos et in his colendis nocturnas pervigilationes sic Aristophanes facetissimus Poeta Veteris Comoediae, vexat, ut apud eam Sabazius, et quidam alii Dii peregrini judicati, e Civitate ejiciantur.

* Hanc quidem ob rem *Hedera* et *Olympiis* sacris arcetur, et neque *Athenis* in *Junonis*, neque *Thebis* in *Veneris* sacris ullus *Hederae* sylvestri locus est: *Bacchanalibus*, aliisque id genus sacris, quorum major pars peragitur IN TENEBRIS, adhibetur.

Had He stood in need of greater Authority, He might have pleaded that of *Agefilaus* :

Nihil etiam Agefilai facto sapientius : Siquidem cum adversus Remp. Lacedaemoniorum conspirationem ortam noctu comperisset, leges Lycurgi continuo abrogavit, quae de Indemnatis supplicium sumi vetabant ⁸.

⁸ Valer. Max.
VII. 2.

Αγησίλαος συνεβόλευσεν ἀκρίτως ἀποκτείνειν ΤΟΥΣ ΣΥΝΙΟΝΤΑΣ
ΝΥΚΤΩΡ ὑπὸ τὴν τῶν Θηβαίων εἰσβολήν ⁹.*

⁹ Aelian. XIV.
V. H. 27.

I have some Scruples about these two Passages, from what I observe in *Plutarch's* Life of *Agefilaus*, where it is said, that He chose *that Time* to punish in. For as He punished against Law, it was not otherwise safe. So much at least is certain from that Author. But then the other account is not indeed contradicted by him.

Through all the Narration of this Event before us, as it is told by *Livy*, We find nothing making so deep an Impression, as this single Consideration :

Patres Pavoringens cepit, quum publico nomine, ne quideae Conjuratio- nes Coetusque nocturni fraudis occultae aut periculi importarent ¹.

¹ Liv. xxxix.
14.

Quaestionem de Bacchanalibus, Sacrisque nocturnis ².

² Id. ibid.

Occultorum et nocturnorum antistes Sacrorum ³. For so some MSS. have it.

³ § 8.

Quum vinum animos et nox ⁴.

⁴ ibid.

Noctis licentia accesserit ⁵.

⁵ § 13.

The Dread, I say, of all Nightly Meetings was the constant manner of that Nation. They began with it, when they began to be a People, and they continued it down afterwards, whatever other Changes they underwent :

Οὐδ' ἂν ἴδοι τις παρ' αὐτοῖς, καίτοι διεφθαρμένων τῶν ἡδῶν ἤδη, ἔ θεοφορή-
σεις, ἔ κορυβαντισμὸς, ἔκ ἀγερευς, ἔ βακχείας, καὶ τελετὰς ἀπορρήτους,
ἔ ΔΙΑΠΑΝΝΥΧΙΑΣΜΟΣ ΕΝ ΙΕΡΟΙΣ ΑΝΔΡΩΝ ΣΥΝ ΓΥ-
ΝΑΙΞΙΝ ⁶.

⁶ Dionys.
Halic. II. 19.
⁷ Jul. Paul. V.
Recept. Sent.
23.
Add. l. 5. et 7.
Cod. Theod.
de Pagan. Sa-
crif. et Temp.

Qui Sacra impia nocturnave — fecerint, faciendave curaverint, aut cruci suffiguntur, aut bestiis subjiciuntur ⁷.

* *Agefilaus* suavit, ut indicta causa occiderent eos qui sub impressionem *Thebanorum* coitionem noctu fecerant.

† *Nemo apud illos videre potest, moribus licet hodie corruptis, mentes deo agitalas, non furores Corybanticos, non Aegyptiarum praestigias, non Bacchationes, et mysteria abdita, non denique pervigilia Virorum cum Feminis in templis et delubris.*

And

And we find the punishments inflicted upon the primitive Christians pretty much resemble the Penalty here recorded by *Paulus*.

I have dwelt the longer upon these Reflections, in order to answer a difficulty which I had in View, and which is relative to the Subject before us.

It may be asked, in that almost universal Licence or Toleration, which the Ancients, the Romans particularly, extended to the Professors of all Religions whatsoever (provided the public Peace was not interrupted or endangered by the indulgence) *why the Christian Profession alone, which might have expected a fairer Treatment, seems to stand excluded, and frequently felt the Severity of the bitterest Persecution?*

My Reader will grant the Fact: and I come now to account for it.

It is not true, that the primitive Christians held their Assemblies in the Night time, to avoid the Interruptions of the Civil Power: but the Converse of that Proposition is true in the utmost Latitude, viz. that they met with Molestations from that Quarter, *because their Assemblies were nocturnal*. From some passages of Scripture, not well understood⁵, They were ready to believe, that the second Advent, which they so ardently expected, would happen in the Night-Season: and their perpetual *Vigils* at the Tombs of Saints and Martyrs are to be met with in all the Writers of Ecclesiastical Antiquity. It is upon this principle, that They have been called *Latebrosa et lucifuga Natio*⁶. And a little below in the same Author⁷, We find the words, *Nescio an falsa, certe occultis ac nocturnis sacris opposita Suspicio*. A jealous Government therefore, and a Stranger to the true Principles of that Profession, was naturally open to such Impressions: and could not but exert that Caution and Attention, which the Practice of their Country so warmly recommended.

These Suspicions were considerably enflamed by, what passed with the Pagan Governors for a certain sign of Conspiracy, the Christian Term *Sacramentum*, To meet by Night, and to bind themselves by a Vow, was the very Object of the Decree now under Consideration. This may be gathered from what *Pliny* writes to the Emperor⁸.

Adfirmabant autem hanc fuisse summum vel culpae suae, vel erroris, quod essent soliti stato die ante lucem convenire, carmenque Christo quasi Deo dicere secum invicem: seque sacramento non in scelus aliquod obstringere, sed ne furta, ne latrocinia, ne adulteria committerent.

And now can any one doubt, that the Considerations, I mentioned, were those which gave an Edge to the Roman Persecutions? The Professors of Christianity had no reason to be apprehensive of any Severities upon the Score of Religion, any more than the Professors of any other Sect or Religion besides. Antiquity, in its public Capacity, was generally (I will not indeed say universally) very indulgent to all who dissented from the established Worship: Persecution for Difference in Belief alone

⁵ 1. Theff. V.² 2. Pet. III. 10.⁶ See Minuc. Felix. c. VIII.⁷ c. IX.⁸ X. Epist. 97.

owes its Nativity to more modern Ages : and Spain was its Country ; where *Priscillian*, by some, is held to be the first Sufferer for mere Opinion. *Bynkershoek*, in his Dissertation upon this *S. Ctum*, is well worth consulting for farther Satisfaction, upon the Article of ancient Toleration : and what I here offer, is only the Gleanings after a great Master.

² Ael. Cap.
XVII.

The State of Athens had no Scruple upon this head. *St. Paul*² remarks their fondness for adopting almost all kind of Worship ; and a Co-temporary Writer with *St. Paul* has this remarkable Expression,

Vtique nostra Regio [by some supposed to be Athens] *tam praesentibus plena est numinibus, ut facilius possis Deum, quam Hominem, invenire*³.

³ Petronius
Arbiter, Cap.
XVII.

And therefore when it is said of *Socrates*,

*Athenienses Socratem damnaverunt, quod novam Religionem introducere videbatur*⁴,

⁴ Valer. Max.
I. 2.

The Case is not fairly put. Nay his very Indictment, as some have recorded it, is imperfect :

Αδικεῖ Σωκράτης, ὃς μὲν ἡ πόλις νομίζει θεῶς, ἔ νομίζων, ἑτέρα δὲ καὶ αἰμαῖονα εἰσηγμένους.*

Every One, that knows the History of those Times, is sensible that *Socrates* suffered rather upon the Score of Politics than Religion. He was too deep in a particular Administration of Government, to be pardoned by the Opposite Party, when They came into Power, notwithstanding their famous Act of Grace : and *Tertullian* moreover in his Apology⁵, compleats the Charge in the following Passage :

⁵ c. 46. Add
Xenoph. Memorab. init.

Lego partem Sententiae Atticae in Socratem: CORRUPTOR ADOLESCENTIAE PRONVNCIATUR.

I must not deny, but that there are some passages in the Old Writers, which look as if the Athenians were not of that tolerant Spirit, nor that Tendernefs of Character, in which I represent them :

Εκεῖνο μόνον ἐτήρην, ὅπως μηδὲν μήτε τῶν πατρίων καλῶσι, μήτ' ἔξω τῶν νομιζομένων προσθήσωσι.[†]

⁶ Isocrat.
Areopag.

Νόμῳ δ' ἦν τῷτο παρ' αὐτοῖς [sc. *Atheniensibus*] κεκλυμένον καὶ τιμωρία κατὰ τῶν ξένων εἰσαγόντων Θεὸν ὥριστο θάνατος.[‡]

⁷ Joseph. c.
Apion. II. 37.

* *Reus est Socrates, quod pro Diis non habet, quos habet Civitas, alios autem peregrinos Deos introducere conatur.*

† *Illud solummodo cavebant, ut neque de patriis ritibus quidquam immutarent, neque praeter receptos quidquam adjicerent.*

‡ *Id erat apud eos legibus interdictum : et Mors poena erat constituta iis qui novum Deum introducebant.*

But

But it is certain, that these Passages, (together with many, which have been brought from other Writers in regard to the *Roman Conduct*⁸) are not fairly urged. There is a great Difference between introducing a *public* Worship, and conniving at a *private* one: between *Establishing* and *Tolerating*. *Dionysius Halic.*⁹ informs us, that in the early Ages of Rome, there was a great Variety of Professions, but very few established by legal Authority:

Καίπερ μυρίων ὄσων εἰς τὴν πόλιν ἐληλυθόντων ἔθνων, εἰς ΠΟΛΛΗ ΑΝΑΓΚΗ
ΣΕΒΕΙΝ ΤΟΤΕ ΠΑΤΡΙΟΣ ΘΕΟΥΣ ΤΟΙΣ ΟΙΚΟΘΕΝ ΝΟΜΙ-
ΜΟΙΣ, ἔθενος εἰς ζῆλον ἐλήλυθε τῶν ξενικῶν ἐπιηδευμάτων ἢ πόλις ΔΗ-
ΜΟΣΙΑΙ.*

And thus are those two Writers to be understood, viz. *Isocrates* and *Josephus*, viz. That the Introduction or Establishment of any New Form of Worship upon private Authority, and without the Concurrence of the Senate, was penal. And the Latter himself tells You, almost in the same place, that it was a common and ordinary practice, to prefer a Bill, and incorporate the new Deity by a public Vote. And indeed, if that had not been a common Practice at Athens, They could never have come by that great Stock of Divinities, which they are represented to have entertained. So fond were They of them, that They erected an Altar to One, whom they had not the least knowledge of, and had not so much as even heard of his Name.

In Rome, as it has been already observed, every thing was directed to the single Consideration of the Public Peace. Thus the CHRISTIANS, for the Reasons which I just now submitted to my Readers, and from a Mis-apprehension of their Religious Principles, were under almost a perpetual Persecution. The JEWS, when They could ingratiate themselves at Court, and represent their Nation as tractable and peaceable, lived upon good Terms with their Masters: At other Times, when the Cry of Turbulence and Sedition was out against them, They felt some Severities. Lastly, the AEGYPTIANS who had a very peculiar Cast of Religion, sufficiently shaded with Nonsense, were, with a grave and sensible People, rather the Object of Contempt than Severity. There is a remarkable Passage concerning *Augustus*,

Peregrinarum Cerimoniarum, sicut veteres ac praeceptas reverentissime coluit, ita ceteras contemptui habuit. Namque Athenis initiatus, cum postea Romae pro tribunali de privilegio Sacerdotum Atticae Cereris cognosceret, et quaedam secretiora proponerentur, di-

* Licet innumerae Gentes in urbem venerint, quibus omnino necesse est colere deos patrios ritu domestico, nulla tamen peregrina Sacra haec Civitas est aemulata, ita ut publice sint recepta.

⁸ Cic. II. de Legg. 8. 10. Liv. I. 20. IV. 30. XXXIX. 16. Spartian. in Hadrian. Tertullian. Apolog. c. 6. ⁹ II. 19.

¹ Philo Legat. ad Caium. Edit. Mang. T. II. pag. 569. seqq. 591. seqq. ² Id. Phil. pag. 562. Sueton. Tib. § 36. C. 1. 9. 1.

misso Concilio, et corona circumstantium, solus audit disceptantes. At contra non modo in peragrandæ Aegypto paulum deflectere ad visendum Apin supersedit: sed et Caium nepotem, quod Judæam prætervehens apud Hierosolymam non supplicasset, laudavit³.

³ Sueton.
Aug. § 93.

⁴ LI. 16.

So We read in *Dion Cassius*⁴ also, that when He was pressed by the People of that Country, to pay his Addresses to their Deity, *Apis*, his Answer was memorable,

Θεὸς, ἀλλ' ὄχι Βὺς, προσκυνεῖν εἰθίσθαι.

His Practice had been to worship Gods, not Oxen.

Let me add an Observation or two upon the Article of the Aegyptian Superstition, together with the Roman Neglect of it, and I close this Subject and this Book together.

It has been remarked by many of the Ancients, that They were of all Nations the most intractable, and disposed to Mutiny.

Sunt Aegyptii Viri ventosi, furibundi, jactantes, injuriosi, atque adeo vani, liberi, novarum rerum usque ad cantilenas publicas cupientes— Genus hominum, seditiosissimum, vanissimum, injuriosissimum⁵.

⁵ Vopiscus in
Saturnin. init.

⁶ Curtius IV.

5.

⁷ Ammian.
Marcellin.
XXII. 11.

⁸ XXXIX. 58.

⁹ Adv. Flacc.
pag. 519 et
521. et de

Agricult.
pag. 310.

¹ Panegy.
c. 31.

² in Aemili-
ano init.

³ Vopiscus
l. c.

Aegyptii, vana Gens, et novandis quam gerendis rebus aptior⁶.

Qua suapte motu, et ubi causæ non suppetunt, seditionibus crebris agitur et turbulentis⁷.

The same Character is constantly given of them, by *Dion Cassius*⁸, *Philo, Judæus*⁹, *Pliny*¹, *Trebellius Pollio*², and many other Writers, both Prophane and Ecclesiastical.

It was upon this Principle therefore, that the Emperors had always a watchful Eye over this Province, and looking upon it as a great Nursery of Rebellion, never trusted an enterprizing Genius among them. So one of my Authors just now cited³:

Saturninus oriundus fuit Gallis, ex gente hominum inquietissima et avida semper vel faciendi principis vel imperii. Huic — Aurelianus limitis Orientalis ducatum dedit, sapienter præcipiens ne unquam Aegyptum videret. Cogitabat enim, quantum videmus, vir prudentissimus, Gallorum naturam: et verebatur, ne, si perturbedam civitatem vidisset, quo eum natura ducebat, societate quoque hominum duceretur. Sunt enim Aegyptii Viri ventosi, and so on as above.

Quod vero Alexandriam propter immensam et repentinam famem, inconsulto se adisset [Germanicus], questus est, [Tiberius] in Senatu⁴.

⁴ Sueton.
Tiber. § 52.

It was upon this Principle also, that the Province of Aegypt was ever under a different kind of Administration from all other Provinces in the Ro-

Roman Empire: not governed by a Proconsul¹, or a Proprætor, but by a peculiar Officer, called *Praefectus Augustalis*, who governed indeed *ad similitudinem Proconsulis*², but with considerably less Authority³. He had under him an Officer, for the Administration of Justice, called *Juridicus*⁴; an Escheator for the Sovereign; and his Retinue was made up of the Household, the Freed Men, and Dependants of *Caesar*. See this very expressly related by *Strabo*⁵, *Dion Cassius*⁶, and *Tacitus*⁷. And I find in *Dion Cassius*⁸, the Office once set so low, as to be assigned to a *Libertus* of the Emperor.

This Caution was in some measure the Caution of *Alexander* before: For which *Appian* is quoted.

Ρωμαῖοι δοκεῖσι παρ' Ἀλεξάνδρου μαθόντες ἐν φυλακῇ ἔχειν Αἴγυπτον, καὶ μηδένα τῶν ἀπὸ Βαλῆς ἐπὶ τῷδε ἐκπέμπειν ὑπαρχόν Αἰγύπτου, ἀλλὰ τῶν εἰς τὰς Ἰππέας σφίσι ζυγτελέωντων.*

See more of this Officer in *Campian*¹, *Paganinus Gaudentius*², *Calvin*³, *Reinesius*⁴.

PRO SALVTE

TI. CLAVDI. CAESARIS. AVG. GERMANICI. PONT. MAX. TRIB. POT. VII. COS. IIII IMP. XV. P. P. CENSORIS LIBERORVMQVE
EX VOTO SVSCEPTO C. IVLIVS SEX. F. COR. POSTVMVS PRAEF. AEGYPTI
TI. CLAVDI. CAESARIS. AVG. GERMANICI. EX AVRI. P. XVI.⁶

It was upon this Principle lastly (and what I now remark was my chief and primary View in these Observations) that in order to manage this untractable and seditious Nation with more ease and security, it was the standing Maxim of their own Governors⁷, and of the Romans after them, to support and encourage that Variety of Religious Worship, for which Aegypt stands so remarkably distinguished, and which has given occasion to one of the finest Satyrs in *Juvenal*:

Crocodilon adorat

*Pars haec: illa pavet saturam serpentibus Ibin*⁸.

I say this blind and superstitious Zeal cut them out work sufficient, without quarrelling with their Masters. They had but little Relish for Politics of State, who were so much taken up with a Holy War, that was brought home to their own Doors:

*Ardet adhuc Ombos et Tentyra. Summus utrinque
Inde furor vulgo, quod numina vicinorum
Odit uterque locus: cum solos credat habendos
Esse Deos, quos ipse colit*⁹.

* *Romani videntur ab Alexandro edocti Aegyptum probe servare, et neminem Senatorem Aegypti Praefectum mittere, verum aliquem e Censu Equestri.*

¹ Trebellius Pollio in Aemiliano.

² D. I. 17. unic.

³ See the Notes ad C. Lib. I. Tit. 37. DE OFFICIO PRAELECTI AVGUSTALIS.

⁴ See D. Lib. I. Tit. 20.

⁵ Lib. XVII. pag. 397.

⁶ LI. 17.

⁷ II. Annal. 59.

⁸ LVIII. 19.

⁹ Cap. CVI.

¹ I. Juridic. Exposit. 8. apud Otton. Thes. J. R. Tom. III.

² Lexic. Juridic. V. PRAELECTVS AEGYPTI.

³ II. Inscript. 26. not.

⁴ Gruter, CXIII. 1.

⁵ Diodor. Sic. I. 89.

⁶ XV. Sat. 2.

⁷ Ibid. 35.

* XLII. 34.

So *Dion Cassius* °,

Θρησκεύσι τε γὰρ πολλὰ, περισσότατα ἀνθρώπων, καὶ πολέμους ὑπὲρ αὐ-
τῶν καὶ πρὸς ἀλλήλους, ἅτε μὴ καθ' ἓν, ἀλλὰ καὶ ἐκ τῆς ἐναντιωσάτης καὶ αὐ-
τοῖς τιμωρῆς τινὰ, ἀναιρεῖναι.*

Thus We find a Variety of Worship, very artfully propagated, not suppressed: and the Aegyptian Superstition rather an Engine of State in the hands of the Sovereigns, than the Object of their Fears, or their Repentments. It found a Way to Rome itself: and brought from the Poet these Words †,

* Lucan.
VIII. 381.

*Nos in Tempia tuam Romana recipimus Isin,
Semideosque Canes, et fistra iubentia luctus,
Et quem Tu plangens hominem testaris Osirin.*

However be it remembered, that I speak not universally. There was a Time, when the Nonsense and Ridiculousness of Aegyptian Rites wrought in the Romans, an Aversion at least, which administered to their Suppression.

Serapidem, et Isidem, et Harpocratem, cum suo Cynocephalo, Capitolio prohibitos inferre, id est, curia Deorum pulsos, Piso et Gabinius Coss. non utique Christiani, eversis etiam aris eorum, abdicaverunt, turpium et ociosarum superstitionum vitia cohibentes ‡.

‡ Tertullian.
Apolog. c. 6.
Add. Dion
Cassius XL.
47. XLII. 26.
LIII. 2. LIV.
6.

‡ See pag.
551. & 557.

I produce this passage the rather, because it may possibly settle the Date of a Law, which I observed above, † to be but slightly recorded. It is probable, I say, from the name of one of the Consuls, and some resemblance of Circumstance, that *Tertullian* here alludes to the Operations of the *LEX GABINIA*. And whoever consults the same Author [*I. adv. Nationes* 10. pag. 55. Edit. *Rigalt.*] will be apt to make that Conclusion.

* Superstitiosissime enim Mortalium varias res venerantur: ac, quia non una ipsis est religio, universis, sed inter se diversissimi in cultu Deorum sunt, bellis quoque ejus rei causa mutus se praesequuntur.

THE END.

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